No. 18903

In the United States Court of Appeals for the Ninth Circuit

Fred Meyer, Inc., a corporation, and Fred G. Meyer and Earle A. Chiles, individually and as officers of said corporation, Petitioners

v.

Federal Trade Commission, respondent

On Petition to Review an Order of the Federal Trade Commission

BRIEF AND APPENDIX FOR RESPONDENT

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INDEX

TABLE OF AUTHORITIES

Cases: Page

Cases—Continued Page

Cases—Continued | Page

Cases—Continued Page

In the United States Court of Appeals for the Ninth Circuit

No. 18903

FRED MEYER, INC., a corporation, and FRED G. MEYER and EARLE A. CHILES, individually and as officers of said corporation, PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

On Petition to Review an Order of the Federal Trade Commission

BRIEF FOR RESPONDENT

This case comes before the Court on a petition to review an order to cease and desist issued by the Federal Trade Commission at the conclusion of an administrative proceeding in which the Commission determined that petitioners Fred Meyer, Inc., a corporation owning and operating a chain of retail grocery supermarkets, and Fred G. Meyer and Earle A. Chiles, two of its officers, have violated section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat 1527; 15 U.S.C. 13(f), by knowingly inducing from certain of their suppliers discriminatory prices prohibited by section 2(a) of that Act, 49 Stat. 1526; 15 U.S.C. 13(a), and violated section 5(a)(1) of the Federal Trade Commission Act, 66 Stat. 632, 15 U.S.C. 45(a)(1), by knowingly inducing from those suppliers discriminatory promotional allowances prohibited by section 2(d) of the amended Clayton Act, 49 Stat. 1527; 15 U.S.C. 13(d).[1]

JURISDICTION

The Commission had jurisdiction of the petitioners and of the subject matter of the administrative proceeding by virtue of section 11(a) of the Clayton Act, 73 Stat. 243, 15 U.S.C. 21(a), and section 5(b) of the Federal Trade Commission Act, 66 Stat. 632, 15 U.S.C. 45(b); and by its issuance of a complaint against petitioners pursuant to those statutes (R. 3-11).[2] This Court has jurisdiction of the parties and subject matter of this review by virtue of section 11(c) of the Clayton Act, 73 Stat. 243, 15 U.S.C. 21(c), and section 5(c) of the Federal Trade Commission Act, 52 Stat. 112, 15 U.S.C. 45(c); by petitioners' timely filing with this Court of a petition to review the Commission's order (R. 707); and by virtue of the Commission's findings (undisputed on this review) to the effect that petitioner Fred Meyer, Inc., is a corporation organized and doing business under the laws of the State of Oregon, with its principal office and place of business in Portland, Oregon (R. 26), that petitioners Fred G. Meyer and Earle A. Chiles are officers of the corporation and maintain offices at the same address (R. 26), and that the corporation does business in and around Portland, Oregon (R. 27).

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[1] Pertinent portions of these and other statutory provisions are printed in appendix "A" to this brief.

[2] Reference is to the record as printed in this Court.

COUNTERSTATEMENT OF THE CASE

We are not able to accept petitioners' statement of the case, because it does not present the questions involved in this review nor show how they are raised by the events of record, because it misstates some and omits other facts essential to decision of the issues petitioners argue, and because it includes, as supposedly established and uncontested facts, what actually are contentions petitioners urged before the Commission and the Commission rejected in favor of findings to the contrary.

In the following statement we have attempted to recount the events of the administrative proceeding which led to this review, summarizing the nature of the essential findings and rulings made by the Commission, and identifying those as to which petitioners' arguments appear to raise issues requiring decision here.[3]

Proceedings Before the Commission

The administrative proceeding was instituted on May 15, 1959, by issuance of a complaint charging petitioners (Count I, R. 3-7) with violating section 2(f) of the amended Clayton Act, 49 Stat. 1527, 15 U.S.C. 13(f),[4] and (Count II, R. 7-9) with violating section 5 of the Federal Trade Commission Act, 66 Stat. 632, 15 U.S.C. 45.[5]

Petitioners' answer (R. 12-17) admitted certain facts but denied the essential allegations of the complaint.

[3]Petitioners' specifications of alleged errors does not specify any particular finding as erroneous, asserting only that certain holds are erroneous "as a matter of fact and law," and that "none of the conclusory findings of violation" are supported by evidence (Brief 7). We have, therefore, attempted to identify from petitioners' arguments the findings and rulings with which they desire to take issue.

[4] Apdx A, p. 1b.

[5] Apdx A, p. 1b.

Extensive hearings were held before two successive hearing examiners in 1959, 1960, and 1962, after which proposed findings and briefs were submitted, and the second examiner, on January 23, 1962, issued an initial decision (R. 18-55) containing conclusory findings, his opinion that petitioners' practices violate the statutes as alleged, and a proposed order to cease and desist.

Petitioners appealed to the Commission, which considered the matter *de novo* on the record, briefs, and oral argument, and on March 29, 1963, issued its opinion (R. 59-142) containing its own findings and rulings supplementing and modifying those in the initial decision. It also issued an accompanying order (R. 56-58) containing a proposed order to cease and desist different from the examiner's, and providing for the receipt from petitioners of objections thereto.[6]

After receipt and consideration of petitioners' objections the Commission on July 9, 1963, issued an opinion thereon (R. 148-57), accompanied by a final order containing the order to cease and desist as finally adopted.[7]

Petitioners do not argue here that any procedural errors occurred in the administrative proceeding.

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[6] The opinion was by Chairman Dixon. Commissioner McIntyre concurred, Commissioner Anderson concurred completely in the decision on the section 2(f) count and in the result on the section 5 count, Commissioner Elman concurred in the result on the 2(f) count and in the decision as to violation on the section 5 count and dissented as to the terms of the order on the latter count, and Commissioner Higginbotham did not participate because the case was argued before he joined the Commission (R. 58, 142-47).

[7] The final order was inadvertently omitted from the printed record in this Court, and is therefore reproduced in appendix "B" to this brief.

As before, Commissioner Elman dissented to the decision as to the form of the order on the section 5 count and Commissioner Higginbotham did not participate.

The Findings and Rulings of the Commission

The Commission found that Fred Meyer, Inc., is an Oregon corporation which operates 13 retail supermarkets in and around Portland, Oregon, selling grocery products, drugs, sundries, and a limited line of clothing, that its 1957 sales exceeded forty million dollars, and that it claims to sell one-fourth of all food sold at retail in that area, to be the second largest seller of all goods in that area, to sell to 75% of Oregon's population, and to have one supermarket in every neighborhood in Portland (R. 60). It found that Fred G. Meyer and Earle A. Chiles are respectively Chairman of the Board and President of the corporation and are the principal owners of its common stock (R. 61), that the corporation is but the "*alter ego*" of those two individuals, that they and their immediate families own virtually all of its voting common stock (R. 136), that they knew about and authorized the practices found unlawful, that they set the corporation's advertising policy and reviewed its advertising practices, that Mr. Meyer had been in the industry for 50 years (R. 137), that they could not have occupied their positions for the 25 years during which those practices were used without having been aware of and personally approving them, and that they are the persons with the actual power to see that the order prohibiting those practices is carried out (R. 138). Principally based upon those facts, the Commission concluded that its order to cease and desist should apply to those individuals, and issued its order accordingly (Apdx B). Petitioners have not specified any of these findings as error, nor have they argued that any of them is not supported by substantial evidence. However, they specify the order's inclusion of the individuals as error (Brief 8, sp. 6), and in their argument on that issue (Brief 95-96) they assert several purported facts contrary to certain of those findings. We maintain (*infra*, pp. 31-34, 91-92) that in an appellate review such as this the findings made below are conclusive unless shown by petitioners to be unsupported by substantial evidence, that the findings rather than petitioners' assertions therefore establish the relevant facts, and that in the circumstances of this case the Commission did not abuse its discretion in making its order applicable to those individuals.

The Commission found that petitioners, in connection with their purchases in interstate commerce of merchandise for resale at retail, have induced and received preferential treatment from their suppliers, in the forms of discriminatory prices on such merchandise and discriminatory payments for services rendered the suppliers by the corporation. Most of these were received under the corporation's annual "coupon book" promotion, which petitioners began in about 1936 and have used every year since. Under that plan they sell to consumer-customers, at a price of ten cents each, 72-page coupon books. Each page features a single product, and states the price at which their stores have regularly been selling it, the specially reduced "coupon" price, the difference between those prices as the amount the coupon is worth when presented in purchasing that product, and other advertising statements. The period during which the coupons may be redeemed begins always in September, lasts for exactly four weeks, and ends in October. A typical coupon featured canned peaches, regularly 31 cents each, and entitled the customer presenting it to obtain three cans by paying for two at the regular price, thus saving 31 cents. The cover of the 1957 book states that the use of all 72 coupons can result in total savings of over $54. Customers bought $13,870 worth of books (138,700) in 1959 and $12,127 worth (121,270) in 1958 (R. 61-64). Petitioners have not specified any of these findings as erroneous, and do not argue that any of them is not supported by substantial evidence.

The Commission found (R. 64-65) that the amounts received by petitioners from the sale of the coupon books was not enough to cover the costs of publishing, distributing, and promoting them. It found that those costs were borne by the participating suppliers, each of which had in effect bought a single page in the book at a price of $350, and paid for it in cash, free goods, or some other mutually acceptable form, so that each year petitioners have received approximately $25,200 from their suppliers for publication of the coupon books. The Commission considered and explicitly rejected (R. 65, note 10) petitioners' arguments that only the *cash* payments they received were for services rendered, and that the payments in kind should not be counted. The Commission found that at least $350 per page, in cash, free goods, or otherwise, was received from each participating supplier as compensation for the coupon book page. It found that petitioners' actual costs, including art work, typesetting, printing, distribution, sale, and advertising were $23,318 in 1956 and $23,406 in 1957, so that the amounts received from sale of the coupon books to consumers was net profit on that part of the operation. Principally based upon these facts the Commission concluded that the $350 paid by each participating supplier was a payment "as compensation or in consideration for * * * services or facilities furnished by * * * such customer in connection with the * * * sale, or offering for sale" of that supplier's product, cognizable under section 2(d) of the amended Clayton Act (R. 64-65). Petitioners do not specify any of these findings or the conclusion as error, or argue that any of them is not supported by substantial evidence.

The Commission found (R. 66-69) that in addition to the $350 for each coupon page, petitioners solicited and received from each supplier additional amounts, in cash or reduced prices or in kind, to cover the reduced retail prices of the merchandise sold to consumers redeeming the coupons. The Commission found that those additional amounts were solicited and received as, and actually were, price reductions made for the purpose of enabling petitioners to resell the merchandise at reduced prices, rather than constituting compensation to petitioners for services to the suppliers. The Commission found that the evidence showed that petitioners' assertions to the contrary were not true (R. 69-74). Based upon those and additional detailed findings the Commission concluded that those amounts were price discriminations cognizable under sections 2(a) and 2(f) of the amended Clayton Act (R. 69-75). Petitioners do not specify any of those findings as erroneous, nor do they argue that any of them is without substantial evidentiary support. However, they specify the conclusion as error (Brief 7, sp. 1), and in their statement of the case they erroneously state (Brief 3), as a supposedly established fact, that all payments received from and made by the participating suppliers were designed and contemplated to constitute reimbursement to Fred Meyer for the furnishing of promotional services and facilities, and argue (Brief 16-26) that, therefore, the granting and receiving of the payments cannot be violations of sections 2(a) and 2(f). We contend (*infra*, pp. 31-34, 77-80) that petitioners' erroneous assertion as to the nature of the finding raises no issue as to its validity, but that in any event the Commission's conclusion is properly supported by the facts.

The Commission found that Tri-Valley Packing Association was one of the suppliers participating in the 1957 sale, that it contracted to pay and paid $350 for a coupon page on which customers were offered its peaches at three cans for the price of two, and contracted to and did replace the "free" cans of its peaches which petitioners' customers obtained by redeeming the coupons. Petitioners invoiced Tri-Valley $350 for the page and $4,814 for 20,-750 coupons (at the wholesale price of $.232 each), totalling $5,164, which Tri-Valley, pursuant to its contract, paid by shipping to petitioners, free of charge, $5,164 worth of peaches (R. 66-68). The Commission found that Idaho Canning, another supplier, participated in the same manner, paying $350 for a page in the 1957 book, plus $2,585.41 for 21,367 coupons redeemed at $.121, a total of $2,935.41, that it paid this amount in the form of free goods (canned corn), and that its coupon had enabled the customers to obtain three cans for the price of two (R. 68). The Commission found (R. 68-69) that Cannon Mills participated in the 1956 sale by reducing its price to petitioners on fingertip towels from $1.65 per dozen to $1.55, for a total reduction of $750, and that its coupon offered the towels at seven for $1.00, instead of the regular price of $.23 each. It found (R. 69) that Burlington Industries participated in 1957 and 1958, reducing the prices of its nylon hose by amounts ranging from $.50 to $.94 per dozen, which aggregated $1,700 in 1957 and $1,800 in 1958. Petitioners do not specify any of these findings as erroneous, nor argue that any of them is not supported by substantial evidence.

The Commission found that in addition to the preferential treatment petitioners received under the annual coupon-book program, they also received certain payments from one supplier, Philip Morris, Inc., as consideration for their performance of certain promotional services for it in connection with their resale of its products (R. 75-80). The Commission found (R. 76-79) that although both petitioners and two other contemporaneous customers of Philip Morris (Oregon Piggly Wiggly Company and United Grocers, Inc.) received payments under its regular promotional allowance program (in which allowances were proportionalized to volume of purchases), the payments in question were not a part of that program, but were "special deals" in which flat, unproportionalized payments were made to and received by petitioners in addition to those they received under the regular program. The Commission found that those "special deals" were, by their very nature, incapable of being offered to competitors on proportionally equal terms, since they were flat payments, not quantitatively related to volume of purchase or any other measureable factor in the buyer-seller relationship (R. 79-82). Petitioners do not specify any of those findings as error and do not argue that any of them is not supported by substantial evidence. They argue, however (Brief 62-66), that despite those facts the Commission should not have found an absence of proportionally equal payments. We contend (*infra*, pp. 53-

57) that the Commission's determination is correct. The Commission also found (R. 79) that no such special deals were paid to, or made available to, the suppliers' other customers. Petitioners do not specify that finding as error, but argue (Brief 89-90) that the evidence does not support it. We contend (*infra*, pp. 54-57) that the finding is supported by substantial evidence.

The Commission found (R. 82-83) that the coupon-book allowances received by petitioners also were not made available to four other Portland buyers who bought the same products and resold them in that area: (1) Hudson House, (2) Wadhams & Co., (3) Lipman, Wolfe & Co., and (4) Roberts Brothers. It found that Hudson House is both a wholesaler and retailer and that it bought canned peaches from Tri-Valley Packing and canned corn from Idaho Canning (R. 82-83), that it owns three Portland retail grocery stores outright, and its controlling stockholder also owns the controlling stock of Oregon Piggly Wiggly, the retail grocery chain mentioned above (R. 85, n. 34). It found (R. 83) that Wadhams & Co. is a Portland wholesaler which bought canned corn from Idaho Canning, that Lipman, Wolfe & Co. is a Portland department store which bought nylon hose from Burlington Industries, and that Roberts Brothers is a Portland department store which bought fingertip towels from Cannon Mills. It found that each of those firms bought the goods in question during the periods when petitioners carried on the particular coupon-book sales but received from the suppliers no offer of any promotional allowances or payments during those periods (R. 83). Petitioners do not specify any of these findings as error, nor argue that any of them is not supported by substantial evidence.

The Commission concluded (R. 84) that all six of those buyers competed with petitioners in the "distribution" of the products in question, within the meaning of section 2(d) of the Clayton Act. It found (R. 84) that Roberts Brothers bought Cannon towels during the period of the coupon-book sales and resold them at retail in competition with petitioners. It found that Lipman, Wolfe & Co. did the same with respect to nylon hose bought from Burlington Industries. It found (R. 84-85) that retail stores of Piggly Wiggly and United Grocers resold Philip Morris products in direct competition with petitioners' retail stores. It found (R. 85, n. 34) that United Grocers is a cooperative nonprofit buying organization owned by some 300 retail-grocer members and thus is not a wholesaler, and that Hudson House, although primarily a wholesaler, also carries on a substantial retailing business. Based primarily on these findings the Commission concluded that those customers of the suppliers, in purchasing the relevant products and commodities from the discriminating suppliers at the same time, handling them, and reselling them either at wholesale or at retail, were thereby "customers competing in the distribution of such products or commodities," within the intent and meaning of that language in section 2(d) of the amended Clayton Act. Petitioners do not specify any of those findings as error, nor argue that any of them is not supported by substantial evidence. However, they assert (Brief 27-28) that both Hudson House and United Grocers acted exclusively as wholesale dealers in their distribution of the commodities involved in this case. We contend (*infra*, p. 57, n. 19) that the Commission's ruling that United Grocers is a retailer, is entirely supported by the unchallenged findings. In addition, petitioners specify as purported error an incorrect version of the Commission's conclusion as to the suppliers' 2(d) violations (Brief 7, sp. 2), and argue (Brief 28-37) that where the recipient of a discriminatory payment or allowance from suppliers is the owner of retail stores, wholesalers selling to other retailers cannot, as a matter of law, be considered "other customers competing in the distribution" of the products concerned, within the protection of section 2(d). We contend (*infra*, pp. 57-66) that the Commission's contrary ruling is correct.

With respect to the suppliers' sales of Tri-Valley peaches and Idaho canned corn, the Commission found (R. 93-94) that the cans sold to Hudson House and Wadhams were packed under the buyers' private labels, that those buyers also bought from other suppliers peaches and corn packed under the same labels, with which the cans bought from Tri-Valley and Idaho Canning were commingled, and that although cans of those products bearing those labels appeared on the shelves of retailers for resale to consumers in competition with petitioners' retail stores, it was not possible to trace particular cans from Tri-Valley and Idaho Canning all the way to shelves of particular stores. The Commission found (R. 94) that the possibility that, despite the commingling, all the cans purchased from those two suppliers found their way by chance to other areas, is too remove for consideration. On the basis of these facts the Commission concluded (R. 95) that direct competition in the resale of those supplies' products existed between petitioners' retail stores and the retailer-customers of Hudson House and Wadhams & Co. Petitioners do not specify any of those findings as error, nor do they argue that any of them is not supported by substantial evidence. However, they argue (Brief 58-61) that competition cannot properly be found unless the evidence traces specific shipments from the discriminating suppliers to specific competing retailers. We maintain (*infra*, pp. 43-47) that such explicit tracing is not necessary, and the Commission's conclusion is properly supported by the facts found.

The Commission concluded (R. 95-96) that the products purchased by petitioners upon which they received the discriminations in prices and allowances were of like grade and quality to those the suppliers contemporaneously sold to those other customers designated above. In reaching that conclusion it found (R. 96) that the suppliers' descriptions and identifying data on each of the products were identical, held that this was sufficient to establish, *prima facie*, that the products were of like grade and quality, and pointed out that petitioners had presented no evidence tending to show the contrary. It found that the mere fact that the goods bore the different private brands of the purchasers was not enough to rebut the inference of identity, and that the independent retailers who competed with petitioners had no doubt that the products were of like grade and quality. Petitioners do not specify as error that conclusion or any of those findings; however, they argue (Brief 46-48, 53-54, 56-58) that the evidence, although showing identity of manufacturers' identifying and grade designations, does not sufficiently establish that the products they purchased from Burlington Industries, Cannon Mills, and Tri-Valley were of like grade and quality to those purchased by the other customers involved in this case. We maintain (*infra*, pp. 40-43, 47-48, 49-50, 52) that the Commission's conclusion is properly supported by substantial evidence.

The Commission found (R. 97-100) that Hudson House did not receive the 33⅓% price reduction on Tri-Valley's canned peaches (aggregating $4,814) which petitioners received during the one-month period of their 1957 coupon-book sale, that neither Hudson House nor Wadhams & Co. received the 33⅓% price reduction (aggregating $2,585.41) on Idaho Canning's corn during the same period, that Roberts Brothers did not receive the $.10 per dozen price reduction (aggregating $400) on Cannon Mills' fingertip towels which petitioners received for those bought for their 1956 coupon-book sale, and that Lipman, Wolfe & Co. did not receive the $.50 to $.94 per dozen price reductions on Burlington Industries' nylon hose which petitioners received during the 1957 and 1958 sales (aggregating $1,350 in 1957 and $1,450 in 1958). It based these findings on the suppliers' invoices showing the prices charged petitioners and the other customers, and testimony of a broker, the unfavored customers, and petitioners (R. 98-99). Petitioners do not specify any of those findings as error, nor argue that any of them is not supported by substantial evidence.

The Commission concluded (R. 100-103) that the effect of those price discriminations may be to injure competition with petitioners. It based that conclusion upon findings that competition in the food industry is keen, that the average retail grocery store carries from 2,500 to 6,000 separate items, that a price differential of one-half of one percent will swing a retailer from one supplier to another, that the net profit of some retailers is as low as 2%, that the profit margin at the wholesale level is about 2%, that the 33⅓% price concessions petitioners received from Tri-Valley and Idaho Canning and passed on to their customers resulted in retail prices below the prices at which other retailers bought those items from the nonfavored wholesalers, and that a price differential of one cent will switch some consumers from one grocery to another. It found (R. 102) that canned peaches and corn were the two fastest moving items in their respective lines (canned fruits and canned vegetables) so that price differentials on them were particularly significant because they attract customers who buy other products also, thereby magnifying the effect of the discrimination. It also found (R. 103) that while petitioners sold Burlington Industries' nylon hose at about 66 cents per pair, one of the nonfavored department stores paid about 64 cents per pair F.O.B. the factory for the same hose at the same time. Petitioners do not specify that conclusion or any of those findings as error, nor argue that any of them is not supported by substantial evidence. They assert, however (Brief 78-79), that the conclusion is wrong; we contend (*infra*, pp. 80-82) that it is a permissible inference, properly supported by the undisputed findings.

The Commission concluded (R. 103-36) that petitioners were aware that the price concessions and promotional payments they induced were discriminatory and not justified by any of the defenses which might have been available to the sellers. Petitioners specify that conclusion as error, and argue (Brief 66-90) that it is not supported by substantial evidence. We contend (*infra*, pp. 67-74, 77-91) that the conclusion is properly supported by the facts found by the Commission (summarized immediately below), and that each of those findings with which petitioners appear to take issue is supported by substantial evidence.

The Commission based that conclusion upon findings, *inter alia*, that petitioners took the most vigorous steps to gather trade information (including monitoring newspaper advertising, "shopping" competing stores, checking competitors' prices, studying market conditions to see that prices they pay were "right," by reviewing suppliers' price bulletins, and by personal contact with brokers), that petitioners relied on brokers for price information, that the broker here concerned was familiar with suppliers' prices and notified petitioners of them, and that prices are a matter of general trade knowledge. It found (R. 110-11) that petitioners could not have been unaware that the other stores here involved were also selling the suppliers' same products. With respect to the participation by Idaho Canning in the 1957 sale, the Commission found (R. 113-16) that petitioners first approached that supplier about the matter during a convention in January of 1957, at which time Idaho did not decide whether or not to participate, and that no contract was signed, no agreement was reached, and nothing was done or said by Idaho to lead petitioners to believe that it was agreeing to participate. That was the last Idaho heard of the matter until the fall of 1957, when it learned that a page in petitioners' 1957 coupon book had featured three cans of Idaho's corn for the price of two, and it received from petitioners an invoice stating it owed them a total of $2,-935.41 ($350 for the page and $2,585.41 for 21,367 coupons redeemed at $.121). It denied the invoice and returned it to Fred Meyer, Inc. Petitioners continued to buy from Idaho, and subsequently deducted the amount of $2,935.41 from one of Idaho's invoices. Idaho protested, and petitioners returned the money to Idaho, but a few months later Idaho yielded and shipped petitioners $2,-935.41 worth of free goods, in order to satisfy petitioners' claims (R. 113-14). The Commission also found (R. 119-

20) that the payments and price concessions petitioners received in the coupon-book promotions were granted under agreements, formulated by petitioners, containing a provision that the supplier's "Offer Must Be Exclusive at Fred Meyer During the 4 Week Period," which constituted an agreement that during that particular four-week period the supplier would not participate in a similar program of another buyer, so that petitioners not only knew they were obtaining discriminatory favors, but were affirmatively requiring them. The Commission held (R. 117-18) that petitioners had more than enough information to put upon them the duty of making inquiry as to whether or not the suppliers were making the promotional payments available to other buyers. Petitioners do not specify as error any of those findings, nor argue that any of them are unsupported by substantial evidence. However, they argue (Brief 82-83) that the evidence does not show they required that the sellers' offers to them be exclusive during the periods of the promotions, nor (Brief 85-90) that they knew or had reason to know about the suppliers' treatment of other buyers with respect to prices and allowances, or that those buyers were purchasing products of like grade and quality. We contend (*infra*, pp. 67-73) that the Commission's findings to the contrary are supported by substantial evidence and therefore are conclusive. They also assert (Brief 69) that the Commission did not find and there is no evidence to support a finding that they exercised coercion on the suppliers; we contend (*infra*, p. 82, n. 34) that the undisputed findings summarized above concerning Idaho Canning show coercion.

The Commission held (R. 120-25) that even if the suppliers had offered to pay other buyers for some other kind of promotion during the same four-week period, or for the same kind during some other period, such offers would not have been upon "proportionally equal terms," within the requirement of section 2(d) as to simultaneity and likeness of benefits. Petitioners do not specify either of those rulings as error, and do not argue that they are incorrect.

The Commission concluded (R. 130-36) that the sellers' price discriminations were not cost justified (under the proviso in section 2(a)), and that petitioners knew or should have known that fact.[8] It found (R. 131-32) that none of the four suppliers grant quantity discounts, that during eleven months of the year petitioners pay the same prices to those sellers as do other buyers, being unable to induce price discriminations during those months despite purchasing in larger quantities than their competitors. It found (R. 132-33) that the increase in petitioners' volume of purchases for the four-week period was incapable of producing sufficient savings, and held that it would be anomolous to permit a buyer who receives a large price discrimination and uses it to increase his sales volume, to claim the increased volume as causal justification for the discrimination. It found (R. 133) that if the nonfavored buyers had also received a 33⅓% price cut they too would doubtless have increased their sales and therefore their purchases from the suppliers. It found (R. 133-34) that every feature of petitioners' purchasing from the four suppliers in question remained the same during the promotion as during the rest of the year, and that the only possible saving suggested—on the cost of labeling Idaho corn with private labels—could not amount to one-third of the price of the can and contents. Petitioners do not specify that conclusion or any of those findings as error. They argue, however (R. 73-78), that the evidence does not establish that the discriminations were not cost-justified, or that they were so aware. We contend (*infra*, pp. 82-91), that the findings with which petitioners appear to take issue are supported by sub-

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[8] Section 2(a) contains a proviso that nothing herein "shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

stantial evidence, and that the facts found properly support the Commission's conclusion.

The Commission found (R. 139) that the violations by petitioners involved vastly more products than the five in the instances specifically found unlawful, which were merely illustrative of petitioners' practices. It found that the coupon-book promotions have involved no fewer than 72 products each year for more than 25 years, and the same suppliers do not participate every year. It found (R. 139) that petitioners do not confine their solicitation of suppliers to particular products or classes of products, so that any of the many thousands of products petitioners sell can be featured in the coupon-book sales. The Commission therefore concluded (R. 139) that the public interest requires that its order to cease and desist cover all products petitioners retail. Petitioners do not specify any of those findings or that conclusion as error, nor argue that any of them is not supported by substantial evidence.

In conclusion the Commission adopted (R. 141) the hearing examiner's decision that petitioners have violated section 2(f) of the amended Clayton Act by knowingly inducing and receiving price discriminations violative of section 2(a) of that Act, and have violated section 5 of the Federal Trade Commission Act by knowingly inducing discriminatory payments and allowances violative of section 2(d) of the amended Clayton Act. Petitioners specify as error (Brief 8, sp. 5) the holding that knowingly inducing a discrimination violative of section 2(d) violates section 5, and so argue (Brief 91-94). We contend (*infra*, pp. 35-39) that the ruling is correct.

The Order to Cease and Desist

Based upon the findings, conclusions, and rulings summarized above, the Commission entered an order to cease and desist (Apdx B, pp. 3b-5b), the first prohibition of which directs petitioners and their agents, representatives and employees, in connection with the offering to purchase and purchase in commerce of products for resale in outlets operated by petitioners, to cease and desist from:

> Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price [petitioners] know or should know is below the net price at which said products of like grade and quality are being sold by such seller to other customers where [petitioners] are competing with the purchaser paying the higher price or with a customer of the purchaser paying the higher price.

The order provides that in determining "net price" under the terms of the order "there shall be taken into account all discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are affected."

The second prohibition of the order directs petitioners and their agents, representatives and employees, directly or through any corporate or other device, in or in connection with any purchase in commerce, to cease and desist from:

> Inducing and receiving anything of any value from any supplier as compensation or in consideration for services or facilities furnished by or through [petitioners] in connection with the processing, handling, sale or offering for sale of products purchased from such supplier, when [petitioners] know or should know that such compensation or consideration is not being affirmatively offered or otherwise made available by such supplier on proportionately equal terms to all of its other customers competing with [petitioners] in the sale and distribution of such supplier's products, including other customers who resell to purchasers who compete with [petitioners] in the resale of such supplier's products.

Petitioners specify as error the order's application to the individual petitioners (Brief 8, sp. 6), and argue that issue (Brief 95-96). We contend (*infra*, pp. 91-92) that, upon the facts of this case, the Commission's decision to include them in the order was not an abuse of its discretion.

Petitioners also specify as purported error an allegation that the Commission failed to frame the order in terms bearing a reasonable relation to the violations found (Brief 8, sp. 7), and in support of that specification argue (Brief 96-101) that certain provisions included in the proposed order drafted by the hearing examiner (which the Commission did not adopt), but not in the order drafted and issued by the Commission, are improper. We contend (*infra*, p. 91) that since petitioners' specification is misdirected and their criticisms of those provisions are moot, their argument presents no issue, but that in any event the Commission's order is clearly proper in scope and terms.

Finally, despite having just criticized those terms which are not in the Commission's actual order, they argue (Brief 102) that a provision in that actual order, but not in the hearing examiner's proposed one, is improper. We contend (*infra*, p. 91) that its inclusion was not erroneous.

SUMMARY OF ARGUMENT

I. Much of petitioners' argument is vitiated by their reliance upon purported facts contrary to findings neither specified as error nor argued as unsupported by substantial evidence, and, as to the findings which they do argue as erroneous, by their mistaken expectation of a trial *de novo* upon the administrative complaint and the evidentiary record, rather than an appellate review as to the substantiality of the evidence, to which they are limited by applicable statutes and controlling decisions.

Petitioners' statement of the case is inadequate and inaccurate, consisting merely of a reference to the administrative complaint and argumentative statements as to a few purported facts. Throughout their brief they ignore the findings, make assertions of purported fact contrary to them, and cite favorable scraps of evidence as though that settled the matter on this review. Their arguments thus are of the sort properly addressed to an original trier of the facts rather than an appellate court.

Contentions which depend upon purported facts contrary to findings neither specified as error nor argued as unsupported by substantial evidence should be disregarded. Contentions which depend upon *de novo* trial of facts are likewise invalid.

Evidence is substantial if it is enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. The "substantial evidence" rule places a greater limitation upon reviewing courts than the "clearly erroneous" rule applicable to review of findings of a trial judge sitting without a jury.

In deciding whether evidence is substantial courts will not substitute their judgment for that of the Commission nor pass upon the credibility of witnesses or the weight to be given testimony, or choose between permissible inferences.

II. The Commission correctly determined that petitioners have violated section 5 of the Federal Trade Commission Act by knowingly inducing and receiving discriminatory payments prohibited by section 2(d) of the amended Clayton Act.

A. The knowing inducement and receipt of discriminatory payments of the type declared illegal by section 2(d) of the Clayton Act constitute unfair methods of competition and unfair acts and practices in violation of section 5 of the Federal Trade Commission Act.

The Commission and courts in a number of cases have uniformly held that practice to violate the Federal Trade Commission Act. The decisions simply apply the familiar, long-established principle that it is an unfair trade practice violative of section 5 to procure, participate in, or aid and abet the use by another of a trade practice which is illegal, unfair, or against public policy.

By inducing and receiving discriminatory payments petitioners contravened established federal antitrust policy, and caused suppliers to violate federal statutes.

The Commission's use of section 5 to enforce established policies, by proceeding under it against business methods contrary to the policy of those statutes, is in strict accordance with Congressional purpose and has received explicit Supreme Court approval.

B. The Commission correctly determined that petitioners' suppliers have violated section 2(d) of the Clayton Act by contracting to make and making their payments to petitioners.

1. Substantial evidence supports the Commission's findings to the effect that during petitioners' 1957 coupon-book sale, Hudson House was another customer of Tri-Valley competing with petitioners in the distribution of canned peaches of like grade and quality.

Petitioners' contention that the evidence does not show that the contents of Tri-Valley's cans of fancy-grade peaches sold to petitioners was of the same grade and quality as those sold to Hudson House is incorrect. The invoices show that the shipments were identical in every identifiable way except label. The mere fact that the goods bear the private brands of the buyers is insufficient to rebut the inference of identity that is raised by the use of identical descriptions by the sellers and identical treatment by both sellers and buyers. The use of identical terms in invoices to describe products necessarily means that the supplier regarded them as substantially identical, and it would be error to treat as important, in determining like grade and quality, factors which the parties concerned considered at the time were too insignificant to warrant different treatment, or even mention. There is no evidence in the record indicating any variation between the contents of the cans involved in the various shipments in this case. Where, as here, identical packages of a product of a given USDA grade are treated by all concerned as essentially fungible, they are sufficiently alike to be subject to the Clayton Act's requirements as to nondiscriminatory treatment of competing purchasers.

The Commission's inference that some of the peaches Tri-Valley sold to Hudson House under the latter's private label reached retailers for resale in competition with petitioners retail stores despite commingling by Hudson House with similarly labeled peaches purchased from other suppliers, is a permissible one, and petitioners' contention that the law requires tracing of particular cans from supplier to retailer is erroneous.

When, as here, products of like grade and quality are purchased from several sellers and fungibly commingled in the course of distribution, the specific products of the discriminatory seller need be traced, for 2(d) purposes, only as far as the commingled fungible stock.

2. The undisputed findings support the Commission's inference that during petitioners' 1957 promotion and sale of Idaho Canning Company's canned corn, both Hudson House and Wadhams & Co. were other customers of Idaho competing with petitioners in the distribution of canned corn of like grade and quality.

As in the case of Tri-Valley's peaches, the Commission properly found that some of Idaho Canning's corn reached retail customers of Hudson House and Wadhams & Co. competing in the resale thereof with petitioners' retail stores, and in addition, there is no dispute that those retailers were competing in the resale of commingled stock containing that supplier's products.

3. Substantial evidence supports the Commission's findings to the effect that during petitioners' 1957 and 1958 coupon-book sale and promotion of Burlington Industries' hosiery, Lipman, Wolfe & Co. was another customer of Burlington Industries competing with petitioners in the distribution of hosiery of like grade and quality, and that Burlington did not make available to it during those times any allowances or discounts.

There is no dispute that petitioners and their competitor were selling Burlington Industries' hosiery at the same time. The seller's invoices used the same descriptive designations to identify the hosiery sold to both customers, which sufficiently supports the Commission's finding that the products were of like grade and quality. The testimony of the competitor's hosiery buyer shows that it did not receive and was not offered allowances similar to those granted petitioners.

4. Substantial evidence supports the Commission's findings to the effect that during petitioners' 1956 coupon-book sale and promotion of Cannon Mills towels, Roberts Brothers department store was another customer of Cannon Mills competing with petitioners in the distribution of towels of like grade and quality.

Here also the finding of like grade and quality is properly supported by the supplier's use of identical descriptive designations on its invoices. The finding as to competition in the distribution of the products is properly supported by evidence showing substantially contemporaneous purchases.

5. Substantial evidence supports the Commission's finding to the effect that Phillip Morris did not make available to Oregon Piggly Wiggly Company or to United Grocers, Inc., any payments proportionally equal to those petitioners induced and received from Phillip Morris.

The record shows that Phillip Morris had a regular cooperative promotional program available to all customers on proportionally equal terms, and the payments it made to petitioners in this case were additional ones not paid or offered to petitioners' competitors. They also were for flat sums not related to any quantitative factor in the buyer-seller relationship. Those facts are sufficient to support the Commission's findings that the payments were not available to those competitors and were incapable of being made available on proportionally equal terms.

C. The Commission properly ruled that on the facts of this case both Wadhams & Co. and Hudson House, when acting as wholesalers of the products of the discriminating suppliers, were "other customers" of those suppliers "competing in the distribution of such products or commodities," within the meaning and protection of section 2(d) of the amended Clayton Act.

Petitioners contend that where the recipient of a discriminatory payment or allowance is the owner of retail stores, wholesalers selling to competing retailers cannot, as a matter of law, be considered "other customers competing in the distribution" of the products concerned, within the protection of section 2(d). We submit that the Commission correctly held the section to be applicable to actual competitors without limitation by differences in the functional levels at which they operate. The Commission's construction is in accordance with the statutory language, and is necessary to effectuate the Congressional purpose.

That construction is at odds with a recent ruling of this Court, in a case where the matter was not fully briefed or argued. Because of its great importance to enforcement of the Clayton Act, we submit it should be considered anew.

In order to limit the coverage of section 2(d) in the manner petitioners wish, it would have to be construed as if it contained, in place of "competing in the distribution," a phrase such as "competing at the same functional level, as at wholesale or retail, in the direct resale to customers in the same functional class." Such a construction would be contrary to the language of the Act, which nowhere bases any distinction upon, or even mentions, any of the many functional classes of merchants.

The Robinson-Patman amendments to the Clayton Act were motivated by a purpose to protect the small independent retailer and his wholesaler suppliers from the great direct-purchasing power of their larger competitors. Petitioners' construction of section 2(d) would thus deprive of its protection the very merchants it was enacted to protect, while increasing their disadvantage by requiring that other direct-buying chains with which they compete also be given the allowances. Adoption of the Commission's construction is the only way to avoid that complete reversal of the intended effect of the section. That construction is not strained, but gives the crucial word—"distribution"—its precise meaning. When, as here, petitioners compete with wholesalers for the favors of sellers when making their purchases, and when both petitioners' retail stores and those wholesalers' customers compete with each other for consumers' favor, petitioners and the wholesalers are in competition "in the distribution of" the products for which both seek to obtain the same consumers' dollars.

The ability of the more than 100 independent retailer-customers of the two wholesalers involved in this case to compete on an equal basis with petitioners depends on their obtaining through those wholesalers the benefits of proportional shares of the promotional allowances given by the suppliers.

Congress intended by the interrelationship of sections 2(a), 2(d), and 2(e) to prevent circumvention of the prohibitions of section 2(a) by use of alternatives for price discriminations. It necessarily follows that in any circumstance in which a price discrimination would violate 2(a), a discriminatory allowance would violate 2(d) and a discriminatory service would violate 2(e). It is well settled that price differentials between wholesalers and retailers are price discriminations within the coverage of section 2(a), and petitioners do not contend otherwise in their arguments concerning the holding that the price differentials between them and the same wholesalers violated that section.

For these reasons we submit that the Court should reconsider this question and hold that, upon proper facts, including those of this case, a wholesaler may be a "customer competing" with a retail chain "in the distribution of" a discriminating supplier's products, within the meaning and protection of section 2(d).

D. The Commission's finding to the effect that petitioners were aware of the facts making illegal the discriminatory payments they induced and received from their suppliers is properly supported by the undisputed findings as to underlying facts, and by the findings petitioners challenge here, which are supported by substantial evidence.

The record shows that petitioners, at the time they induced and received the payments from their suppliers, had information sufficient to put upon them the duty of making inquiry to ascertain whether the suppliers were making such payments available on proportionally equal terms to their competitors. It shows that petitioners knew, or in the exercise of reasonable care should have known, that payments of the kind they received had not been made available to their competitors. It was petitioners who originated the special programs and demanded payment for them, so that the payments necessarily were ones other customers were not then receiving, and therefore the payments could not be available to those other customers unless the suppliers took action to make them so. Petitioners, knowing this, had the duty to make inquiry of the buyers as to whether or not they were doing so. There is nothing in statute or decision which precludes the imposition of such a duty of reasonable inquiry upon a buyer. Petitioners' protestations of ignorance cannot avail, because it is settled law that "everyone is presumed to know everything he can learn upon inquiry, when he has facts in his possession which suggest inquiry," and "must be charged with knowledge of that which it was his duty to know."

Furthermore, the record shows that petitioners demanded and contracted for the discriminatory preferences they received, and cannot now be heard to deny they knew they were getting them.

III. The Commission correctly determined that petitioners have violated section 2(f) of the amended Clayton Act by knowingly inducing and receiving price discriminations prohibited by section 2(a) of that Act.

A. Because of a subsequent Commission decision in a related case involving, *inter alia*, the same price discriminations by Cannon Mills involved in this case, we do not rely upon those price discriminations in this review.

B. The Commission correctly determined that petitioners' suppliers have violated section 2(a) of the Clayton Act by discriminating in price between petitioners and their competitors, and that petitioners were aware of the facts making those discriminations illegal.

1. The Commission properly determined that the price cuts and rebates petitioners induced and received from Tri-Valley, Idaho Canning, and Burlington Industries were "discriminations in price within the meaning and coverage of section 2(a)."

Petitioners' argument that those discriminations were payments for services, within the coverage of section 2 (d), and therefore cannot be price discriminations within the coverage of section 2(a), overlooks the fact that the coverages of those sections overlap. If payments are made in the form of price discriminations, they may violate both sections. The record shows that these discriminations were price cuts and rebates, so they are within section 2(a), and the fact that, as petitioners urge, they might also violate 2(d), is immaterial. It is not true, as petitioners assert, that the Commission in the proceedings it brought against the same suppliers held that those price cuts and rebates were not violations of 2(a), but of 2(d).

2. The Commission's finding that the price discriminations petitioners induced and received might adversely affect competition is not rendered invalid by the circumstance that petitioners' coupon-book sales occur only once each year.

The only attack petitioners make against that finding consists of the erroneous accusation that the Commission "ignored entirely" the fact that the four-week promotion sales occur once per year, and of the unargued assertion that therefore the effect "must have been temporary and minimal, and insufficient to support a finding of violation." The Commission did not ignore the fact, and petitioners' *ipse dixit* is plainly frivolous.

3. Substantial evidence supports the Commission's findings to the effect that the price discriminations petitioners induced and received from Tri-Valley, Idaho Canning, and Burlington Industries did not "make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered," within the meaning of section 2(a) of the Clayton Act, and that petitioners were so aware.

The Supreme Court held in its leading decision that in a case against a buyer under section 2(f) it is the Commission's burden to show that discriminations the buyer induced or received were not cost-justified, and that he was so aware. The Court discussed a few types of evidence which would suffice to support such findings. It said that the buyer which 2(f) was intended to reach was the one who, "knowing full well that there was little likelihood of a defense for the seller, nevertheless proceeded to exert pressure for lower prices." This record establishes both such knowledge in and such pressure by petitioners.

The Court said that a buyer's "trade experience in a particular situation can afford a sufficient degree of knowledge to provide a basis for prosecution." The record shows that petitioners have had long and deep trade experience in the exact situation. The Court also said that if methods or quantities of the competing purchasers differ, it is sufficient to "show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings." The record shows that there were no differences in the *methods* by which petitioners made the purchases in question, and that the insignificant differences in costs resulting from the *quantities* in which they purchased were obviously insufficient to cost-justify 33⅓% price discriminations, and that petitioners were, or in the exercise of reasonable care would have been, so aware. As the Supreme Court said, "a showing that the cost differences are very small compared with the price differential should be sufficient."

The Court also left open the question of whether, in proper cases, "other proof may be sufficient to justify shifting the burden of introducing evidence that the buyer is or is not an unsuspecting recipient of prohibited discriminations." The record shows that petitioners were not mere "recipients" of the discriminations, and that no reasonable person in their circumstances could have been "unsuspecting" of the discriminations' illegality.

Furthermore, even if there had in fact been cost differences equaling the discriminations, they would not constitute cost-justification under section 2(a). This is because that defense is allowed only for price discriminations which result from and are based upon cost savings. Where, as here, the claimed cost savings, if they had existed, would have been the result of the increased sales generated by the discriminations, they cannot be used in a "boot-strap" justification of those discriminations. If the rule were otherwise, any large special-occasion price discrimination, such as those in this case, would be self-justifying for the sellers if the special sales are successful, and for the buyers if they reasonably believe they will be successful.

IV. The Commission's inclusion of the individual petitioners, by name, in its order to cease and desist, and its inclusion in the prohibition against inducing and receiving discriminatory payments of a phrase making explicit its valid application to discriminations between petitioners and wholesalers competing with them, was not an abuse of discretion.

The rest of petitioners' attack upon the Commission's order is misdirected, since it consists merely of criticisms of specific phrases used by the hearing examiner in his proposed order, which the Commission did not include in the order it drafted and issued.

ARGUMENT

I. Much of petitioners' argument is vitiated by their reliance upon purported facts contrary to findings neither specified as error nor argued as unsupported by substantial evidence, and, as to the findings which they do argue as erroneous, by their mistaken expectation of a trial de novo upon the administrative complaint and the evidentiary record, rather than the appellate review as to the substantiality of the evidence, to which they are limited by applicable statutes and controlling decisions

In our counterstatement of the case (*supra*, pp. 3-20) we have attempted to identify and present the questions involved in this review, and describe the manner in which they are raised by the events of record and petitioners' contentions here. Our doing so has been made necessary by (1) petitioners' failure to specify with particularity any of the findings with which they appear to take issue, (2) their presentation, under the label of "Statement of the Case," of what really is a misleading mixture of a few of the facts found, purported facts contrary to other findings, and a summary of the administrative complaint which initiated the proceeding below, and (3) their failure to describe any of the other findings or rulings—even those with which they take issue in their arguments.[9]

It is evident from these and other features of petitioners' brief that they expect from this Court a trial *de novo* upon the Commission's complaint and the evi-

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[9] *Cf. Thys Company* v. *Anglo California National Bank,* 219 F.2d 131, 132-34 (9th Cir. 1955), *cert. denied,* 349 U.S. 946.

dentiary record, rather than an appellate review of the Commission's decision. They have briefed the case almost as though that decision had no significance here apart from its mere existence, and their arguments are of the sort properly addressed only to an original trier of facts, in support of proposed findings, rather than to an appellate court, in support of an attack upon existing findings.

That fundamental error vitiates much of petitioners' argument in this Court. It is well established that court review of Commission decisions is "appellate and revisory merely, and not an exercise of original jurisdiction by the court itself." *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U.S. 619, 624 (1927). Contentions in an appellate proceeding which, as many of petitioners' do, depend upon purported facts contrary to findings neither specified as error nor argued as unsupported by substantial evidence, should be disregarded. Contentions which depend upon the reviewing court's disregarding the appellate nature of the proceeding and making new findings from the evidence are likewise invalid, because such trial *de novo* is interdicted by plain statutory proscriptions and consistent court decisions. Section 11(c) of the Clayton Act (73 Stat. 243, 244, as amended, 15 U.S.C. 21(c)), which authorizes and controls the review of the first paragraph of the Commission's order, provides that "the findings of the commission or board as to the facts, if supported by substantial evidence, shall be conclusive." Section 5(c) of the Federal Trade Commission Act (52 Stat. 112, 15 U.S.C. 45(c)), which authorizes and controls review of the second paragraph of the Commission's order, contains a similar provision. They have the same meaning as section 10(e)(B)(5) of the Administrative Procedure Act (60 Stat. 243, 5 U.S.C. 1009(e)), which authorizes reviewing courts to set aside agency findings which are "unsupported by substantial evidence." See 4 Davis, *Administrative Law*, 116-17.

The Supreme Court has held that evidence is substantial within the meaning of those statutes if it is "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 477 (1951). The "substantial evidence" rule places a greater limitation upon reviewing courts than the "clearly erroneous" rule applicable to review of findings of a judge sitting without a jury. *United States* v. *United States Gypsum Co.,* 333 U.S. 364, 395 (1948). In addition, the statutory grant of authority to reviewing courts to set aside agency findings unsupported by substantial evidence was not intended "to negative the function of * * * those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." "Nor does it mean that even as to matters not requiring expertise a court may displace the [Commission's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Universal Camera, supra,* 340 U.S. at 488. *Accord, Carter Products, Inc.* v. *Federal Trade Commission,* 268 F.2d 461, 492 (9th Cir. 1959), *cert. denied,* 361 U.S. 884.

As this Court has held, in deciding whether supporting evidence is substantial, "courts will not substitute their judgment for that of the Commission" nor "pass upon the credibility of the witnesses and the weight to be given their testimony in the light of it all, conflicting or otherwise," and "the findings of the Commission, when * * * the record as a whole gives them substantial support, are final *even though the evidence is so conflicting that it might have supported the contrary* had such findings been made." *DeGorter* v. *Federal Trade Commission,* 244 F.

2d 270, 273 (9th Cir. 1957). Furthermore, as this Court held in *Carter Products*, *supra*, 268 F.2d at 491, it is not the duty of reviewing courts "to weigh the evidence before the Commission and/or choose between inferences which might arise from an appraisal of the probative worth of this evidence, since exercising those important functions became the primary duty of the Commission"; it is "for the Hearing Examiner and the Commission, not the Courts, to pass upon the credibility of witnesses and the weight to be accorded their testimony" as well as "the *weight* to be given by the Commission to the facts and circumstances admitted as well as inferences reasonably to be drawn therefrom"; and "the possibility of drawing either of two inconsistent inferences from the evidence does not prevent the Commission from drawing one of them."

Those holdings by this Court are in conformity with those of the Supreme Court and other courts of appeals. See, *e.g.*, *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726, 739 (1945); *Federal Trade Commission* v. *Pacific States Paper Trade Ass'n*, 273 U.S. 52, 63 (1927); *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106 (1942); *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 117 (1937); *Federal Trade Commission* v. *Sewell*, 353 U.S. 969 (1957).

We contend that the Commission's findings in this case are conclusive as to the facts, because those which petitioners attack in their arguments are supported by substantial evidence (as we shall show below), and those which they do not argue as lacking such support are not placed in issue merely because petitioners ignore them or base their arguments on contrary assertions.

II. The Commission correctly determined that petitioners have violated section 5 of the Federal Trade Commission Act by knowingly inducing and receiving discriminatory payments prohibited by section 2(d) of the amended Clayton Act

A. *The knowing inducement and receipt of discriminatory payments of the type declared illegal by section 2(d) of the Clayton Act constitute unfair methods of competition and unfair acts and practices in violation of section 5 of the Federal Trade Commission Act*

This review involves a practice which the Commission and the courts in a number of cases have uniformly held to violate the Federal Trade Commission Act. Earlier cases include In re *United Cigar-Whelan Stores Corporation*, 53 F.T.C. 102 (1956); In re *Trifari, Kruseman & Fishel, Inc.*, 55 F.T.C. 397 (1958); In re *Keystone Mfg. Co., Inc.*, 55 F.T.C. 885 (1958); In re *Grand Union Co.*, 57 F.T.C. 382 (1960), *aff'd*, 300 F.2d 92 (2d Cir. 1962); In re *American News Co.*, 58 F.T.C. 10 (1961), *aff'd*, 300 F.2d 104 (2d Cir. 1962), *cert. denied*, 371 U.S. 824; In re *Giant Food Inc.*, 58 F.T.C. 977 (1961), *aff'd*, 307 F.2d 184 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963); *R. H. Macy & Co., Inc* v. *Federal Trade Commission*, 326 F.2d 445 (2d Cir. 1964); *Federal Trade Commission* v. *J. Weingarten, Inc.*, 336 F.2d 687, 693 n. 16 (5th Cir. 1964), *cert. denied*, March 2, 1965, 33 LW 3285.

Petitioners' criticism of the rule of law announced in those decisions is entirely misplaced. It is simply an application of the familiar, long-established principle that it is an unfair trade practice violative of section 5 to procure, participate in, or aid and abet the use by another of a trade practice which is illegal, unfair or against public policy. See, *e.g.*, *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922). Wide notice of the applicability of that principle to the practice in this case has been given not only by the decisions cited above but also by the Commission's various

Trade Practice Rules promulgated as guides to specific industries.[10]

By inducing and receiving the discriminatory payments from their suppliers petitioners contravened the established federal antitrust policy embodied in section 2(d) of the Clayton Act and section 3 of the Robinson-Patman Act,[11] caused their suppliers to commit violations of both

[10] See, *e.g.*, the "Trade Practice Rules for the Grocery Industry," promulgated March 19, 1952 (17 Fed. Reg. 2357-59; 16 C.F.R. 209.5, 209.27).

[11] Section 2(d) of the Clayton Act, as amended, 49 Stat. 1527, 15 U.S.C. 13(d) provides—

> That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Section 3 of the Robinson-Patman Act, 49 Stat. 1528, 15 U.S.C. 13a, provides in pertinent part that—

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality and guantity * * *.

Both provisions apply to sellers, and the latter (a criminal statute) applies also to buyers, both by its own terms and by virtue of 18 U.S.C. 2.

those statutes, and contravened the latter Act themselves. By enacting those statutes the Congress made it conclusive that it is contrary to federal antitrust objectives for suppliers to pay and their customers to receive discriminatory payments for reselling services. The Commission and court decisions in this case and those cited above are valid implementations of that legislative determination.

Petitioners' attack upon those rulings (Brief 91-94) misrepresents them and the explanations given by the Commission and the courts in making them. As the Commission and the courts have noted (*e.g.*, *Grand Union*, 57 F.T.C. at 422; 300 F.2d at 96), the Congress' omission to mention the practice when amending section 2 of the Clayton Act was inadvertent rather than studious, and therefore the omission cannot be considered an intended curtailment of the Commission's authority, under its organic Act, to prohibit practices contrary to established public policy. The fact that the Clayton Act explicitly denounces certain practices and omits others does not mean that practices denounced or omitted are outside the coverage of the Federal Trade Commission Act. This is made clear by the fact that the Clayton Act was enacted, not because the actions it denounced or the field of economic activity to which it pertained was outside the coverage of the Federal Trade Commission Act, but because the Congress wished to insure that the actions explicitly dealt with in the Clayton Act would not be considered legal despite section 5. 51 Cong. Rec. 15829 (1914).

The Commission's use of section 5 to enforce established public policies, by proceeding under it against business methods contrary to those policies but not violative of any specific statutory provision, is in strict accordance with Congressional purpose and has received explicit Supreme Court approval. *Fashion Originators Guild* v. *Federal Trade Commission*, 312 U.S. 457, 463 (1941); [12] *Federal*

[12] The Court said (312 U.S. at 463): "If the purpose and practice * * * runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of compe-

Trade Commission v. *Cement Institute*, 333 U.S. 683, 694 (1948); *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-95 (1953); *Grand Union, supra*, 300 F.2d at 98-99.[13]

The use of section 5 in this way was approved in advance by the Congress which enacted it and created the Commission to enforce it, as the legislative history of the Act shows in report and debate. H.R. Rep. No. 1142, 63d Cong., 2d Sess. (1914), pp. 18-19 (relating to H.R. 15,613, as reported by the Conference Committee and enacted as the 1914 Federal Trade Commission Act); 51 Cong. Rec. 14,928-29 (1914). See also *Humphrey's Executor* v. *United States*, 295 U.S. 602, 624, 628 (1935).

The Congressional purpose and the Supreme Court's decisions show that the coverage of section 5 extends to all trade practices which, in the language of the Supreme Court in *Federal Trade Commission* v. *R. F. Keppel & Bro.*, 291 U.S. 304, 313 (1934), are unfair in "the normal meaning of the word." In this case there can be no doubt that it is unfair, in any normal meaning of that word, for petitioners to receive from their vendors the substantial benefit of promotional payments not made available to their competitors in the distribution of the vendors' products. It is unfair to the vendors who jeopar-

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tion." Throughout that opinion the Court repeatedly used language emphasizing that the Commission may prohibit practices contrary to the public policy underlying those Acts, without regard to whether or not they violate their terms. See, *e.g.*, pp. 465-66.

[13] The Court held that the Commission properly may resort to section 5 "to realize the basic policy of the Robinson-Patman Act, which was to prevent the abuse of buying power," and, since "activity which 'runs counter to the public policy declared in the Sherman and Clayton Acts' is an unfair method of competition," the Commission may declare conduct of the type concerned here to be "unfair" and thus violative of section 5, "using the policies of § 2(d) as a yardstick" (300 F.2d at 98-99).

dize their relations with their other customers and violate the Clayton and Robinson-Patman Acts, it is unfair to petitioners' competitors who are placed at a disadvantage in their competition with petitioners, and it is unfair to the public whose interest in the preservation of equality of opportunity among competitors lies at the root of the public policy expressed in the Clayton Act and contravened by petitioners' practices.[14]

B. *The Commission correctly determined that petitioners' suppliers have violated section 2(d) of the Clayton Act by contracting to make and making their payments to petitioners*

A breakdown of the provisions of section 2(d) shows that to support a ruling that a supplier has violated that section it must be properly found that—

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[14] Petitioners contend (Brief 93-94) that no practice can be held unfair under the Federal Trade Commission Act without findings of actual or probable adverse effect upon competition. The contention is erroneous. Such findings merely constitute valid alternative grounds for holding practices unfair, not required elements of proof in every section 5 case, as is shown by the decisions petitioners cite. It is also shown by the legislative history of section 5 and its amendments; for example, it was said in debate upon the Wheeler-Lea Act (52 Stat. 111 *et seq.*), which amended the section to prevent misunderstanding upon this precise point, that "when the Federal Trade Commission Act was originally passed it was hoped by the Congress, as committee reports will show, that it would give the Commission power to stop certain unfair and deceptive practices if they were against public interest and were detrimental, regardless of whether or not they resulted in financial injury to some competitor." 80 Cong. Rec. 6436 (1936).

In cases such as this, where the unfairness is clearly established by factors other than competitive injury, findings on that point are not necessary. Section 2(d) requires no such finding, so it in any event would not be required in a proceeding to enforce its policy, under section 5. *Grand Union supra,* 300 F.2d at 99; *Giant Food, supra,* 307 F.2d at 186; *Macy, supra,* 326 U.S. at 450.

(1) the supplier is engaged in commerce, and in the course thereof

(2) contracted to make or made payments of something of value

(3) to or for the benefit of a customer

(4) as compensation or in consideration for services or facilities furnished by or through the customer

(5) in connection with the processing, handling, sale, or offering for sale of the supplier's products or commodities

(6) without such payment or consideration being available

(7) on proportionally equal terms

(8) to all other customers competing in the distribution

(9) of such products or commodities.

The Commission made findings as to all of those factors. Petitioners do not challenge here the findings as to the first five factors listed above. They contend, however, that the evidence does not sufficiently prove one or more of the last four with respect to each of their suppliers. The contention is erroneous.

1. Substantial evidence supports the Commission's findings to the effect that during petitioners' 1957 coupon-book sale and promotion of Tri-Valley canned peaches, Hudson House was another customer of Tri-Valley competing with petitioners in the distribution of canned peaches of like grade and quality

The Commission found and petitioners concede (Brief 56) that during September and October 1957 they received from Tri-Valley 2,200 cases of its canned peaches, packed under Fred Meyer's private label, for resale during the coupon-book sale, and that during the same two months Hudson House purchased, under its own private label, 175 cases of identically described merchandise. They argue, however, that the evidence does not show that the contents of the cans were of like grade and quality, and in support of that argument misstate the nature of the part of the evidence upon which they rely. Contrary to their argument, the witnesses did not say that there were differences in grade within the grade designations showing on the invoices. The invoices (CX 42A-43B, 44-47) show that the shipments of peaches sold to Hudson House were identical in every identifiable way (except label) with those sold to petitioners. For example, CX 44 is an invoice from Tri-Valley to Fred Meyer, Inc., dated October 19, 1957, showing shipment on October 8, 1957. The first invoice line shows a sale of 200 24-can cases of size 2½ cans of "CHO HVY YC PCHS HVS" from plant "MO." Correspondingly, CX 42A is an invoice from Tri-Valley to Hudson House dated October 11, 1957, showing shipment on October 9, 1957. The second invoice line shows a sale of 100 24-can cases of 2½ cans of "CHO HVY HVS YC PEACHES" from plant "MO." The only differences on these two invoice lines are the designations of the private labels and the quantities in the shipments. As succinctly stated by the Commission (R. 96):

> A supplier's use of identical descriptive data on invoices to favored and non-favored customers constitutes probative evidence and establishes, prima facie, the fact of like grade and quality. [Petitioners] had every opportunity to show, if they could, that this evidence was inaccurate. The mere fact that the goods bear the private brands of the respective buyers is clearly insufficient to rebut the inference of identity that is raised by the similarity of supplier descriptions.[15]

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[15] It cannot be doubted that the invoices constitute *prima facie* evidence of the facts stated therein or shown thereby. See, *e.g.*, *Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791,

The supplier's use of identical terms in the invoices to describe the products necessarily means that it regarded the products as substantially identical; it would be improper to presume otherwise. Petitioners' contentions suffer from the error that they would require the Commission and the courts to treat as of crucial importance factors which were considered at the time to be too insignificant to warrant different treatment or even mention in the invoices. *Cf. United States* v. *Bryan*, 339 U.S. 323, 332 (1950). The invoices are no less substantial evidence of likeness of grade and quality than those reviewed by this Court in *Tri-Valley Packing Association* v. *Federal Trade Commission*, 329 F.2d 694 (9th Cir. 1964).

Against this evidence that the buyers and sellers of those peaches regarded them as identical for all commercial purposes in the marketplace, petitioners argue only that the contents of cans may vary within their USDA commercial grades because of variations in geographical area where grown, conditions of packing, etc. They produced no evidence of any such variation between the shipments involved in this case, however, and rely only upon the supposition that such variations might have existed. That reliance is misplaced, for two reasons. First, the mere supposition is not enough, in the face of the evidence that buyer and seller treated the cans as

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804-5 (2d Cir. 1924; *Central Paper Co.* v. *Southwick,* 56 F.2d 593, 597-98 (6th Cir. 1932).

The Commission's position is consistent with the decisions in *Atalanta Trading Corp.* v. *Federal Trade Commission,* 258 F.2d 365 (2d Cir. 1958), and In re *Henry Rosenfeld, Inc.*, 52 F.T.C. 1535 (1956), first noted by petitioners at p. 39 of their brief, as well as in In re *Universal-Rundle Corp.*, 3 CCH Trade Reg. Rep. ¶ 16,948 (1964), first cited by petitioners at p. 40 of their brief. Petitioners, we submit, have failed to show otherwise.

commercially identical, to compel the conclusion that there were such differences and thereby make the Commission's inference of likeness of grade and quality an impermissible one. Second, even if the supposition were correct, it would not refute the finding, because variations from can to can which are too minor to be of commercial significance in the marketplace, are plainly not enough to make the products unlike in "grade and quality" for purposes of the Clayton Act. Where, as here, identical (except for label) packages of a product of a given USDA grade are treated by all concerned as essentially fungible, then plainly they are sufficiently alike to be subject to the Clayton Act's requirements as to nondiscriminatory treatment of competing purchasers.[16]

In addition to arguing (Brief 26-37) that Hudson House is a wholesaler and therefore as a matter of law cannot be considered a customer of Tri-Valley competing with petitioners in the distribution of Tri-Valley products (an error which we discuss below, pp. 57-66), petitioners also argue (Brief 58-60) that the evidence does not sufficiently show that the peaches sold to Hudson House were distributed to retailers in the Portland area competing with petitioners' retail stores. That contention also is without merit.

The Commission found (R. 93-95), and petitioners do not dispute here, that the peaches Tri-Valley sold to Hudson House under the latter's private label were commingled by Hudson House with peaches purchased from other suppliers, that cans bearing the Hudson House label appeared on the shelves of retailers for resale in competition with petitioners, that because of the commingling it had not been possible to trace particular cans

[16] *Cf. Bruces Juices, Inc.* v. *American Can Co.*, 87 F. Supp. 985, 987 (S.D. Fla. 1949), *aff'd,* 187 F.2d 919, 924 (5th Cir. 1951); *Moog Industries, Inc.* v. *Federal Trade Commission,* 238 F.2d 43, 49-50 (8th Cir. 1956), *aff'd,* 355 U.S. 411 (1958).

from Tri-Valley to particular retail stores, but that the possibility that all Tri-Valley products by chance found their way to other areas was too remote for consideration.

Petitioners erroneously argue (Brief 58-60) that the fact that Hudson House's customers actually stocked and resold Tri-Valley products during the relevant time period cannot be inferred, but must be proved by direct evidence consisting of a tracing of particular cans. This subject is plainly proper for decision by logical inference from competent evidence, as this Court indicated in *Tri-Valley Packing Association* v. *Federal Trade Commission*, 329 F.2d 694, 708-9 (1964), and the Commission's inference from the evidence plainly is a logically permissible one. The evidence shows, as petitioners recognize (Brief 59-60) that retailer outlets in the Portland area, who compete with petitioners' retail stores, had purchased "Hudson House" peaches from Tri-Valley. The Vice President and Manager of the wholesale division of Hudson House testified (R. 245-47) that it purchased canned fruits and vegetables from Tri-Valley and distributed them to various retailers in the Portland area, that CX 67A through 67Z5 is a list of its larger customer retail stores, upon which those not checked are in the Portland area, and that the stores on the list buy approximately 85% of its volume. We count 287 stores on that list, of which 127 (45%) are in the Portland area, and therefore are in retail competition with petitioners' retail stores.

The former manager of one of those stores testified (R. 510) that his store had sold Hudson House peaches during 1957, that all his purchases of peaches (and of corn) had been from Hudson House "for the last 10 or 11 years" (R. 518), that his store did not keep records showing purchases and inventories of peaches and corn (R. 516-17), and that he remembered that in 1957 or 1958 his peach sales dropped off and he "went to Hudson House, knowing about the coupon book," and Hudson House was unable to help him (R. 517).

A partner-proprietor of another retail grocery testified (R. 538-39) that during August, September, and October of 1957 he purchased canned peaches (and canned corn) from Hudson House, and that one of petitioners' stores is located close to his and is his main competitor (R. 539-40).

The proprietor of another retail grocery testified (R. 636) that it is located seven blocks from one of petitioners', with which it competes, that during petitioners' 1957 coupon-book sale he was buying and reselling canned peaches (and canned corn) purchased from Hudson House under its private ("My-Te-Fine") label (R. 638), and that the peaches and corn which he purchased from Hudson House and sold under that label were of like grade and quality to those which petitioners advertised in their 1957 coupon book, and sold in competition with him during that sale.

A partner-proprietor of another retail grocery testified (R. 660-61) that Hudson House is its source of supply for canned peaches (and canned corn and tobacco products,) that he competes with petitioners' stores, that canned peaches and corn are important items, and that during petitioners' 1957 coupon-book sale his business fell off and he saw petitioners' peaches and corn in homes of his customers when making deliveries during that period.

This evidence is more than sufficient to make permissible the Commission's inference that some of the Tri-Valley-packed Hudson House canned peaches were present on the shelves of retail groceries competing with petitioners' retail stores in the resale of peaches during the 1957 coupon-book sale, and to support the Commission's determination that, in distributing those peaches to retail stores competing with petitioners' in their resale to consumers, Hudson House was *in fact* competing in the distribution of those cans of peaches and corn at the time of petitioners' coupon-book sales.[17]

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[17] Petitioners also appear to argue (Brief 41) that inequality of payments are not proscribed by section 2(d) un-

But in addition, as this Court held in *Tri-Valley, supra,* 329 F.2d at 698, with respect to the affected line of commerce under the 2(a) count in that case, the competition intended to be protected by section 2 is not limited to that in the seller's goods alone. Section 2(d) does not proscribe inequality of treatment of those competing in the distribution of the *seller's products only*, but of those "competing in the distribution of *such* products or commodities." The result is that when, as here, products of like grade and quality are purchased from several sellers and fungibly commingled in the course of distribution, the specific products of the discriminating seller need be

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less the discriminating seller's sales were made at about the same time. The evidence cited above shows that Tri-Valley's sales to petitioners and to Hudson House were simultaneous, but we nevertheless must point out that the argument is erroneous. The statute is in terms of simultaneity of competition in the distribution of the products, not of their purchase. This was plainly intentional, for equality is needed at the time of competition in distribution, and to permit inequality of treatment because of different dates of purchase would have made evasion easy. Time of purchases by different customers is therefore not the element of proof, but merely possible relevant evidence as to simultaneity of competition in distribution, as in *Atalanta Trading Corp.* v. *Federal Trade Commission,* 258 F.2d 365, 372 (2d Cir. 1958), where sales (and deliveries) of perishable products to favored and nonfavored customers were separated by several months. See also *Hartley & Parker, Inc.* v. *Florida Beverage Corp.,* 307 F.2d 916, 921 (5th Cir. 1962).

Where, as here, the arrangement between seller and favored buyer is for payments to be made for promotional services to be rendered at a specified future time, then the seller's obligation is to make similar payments available on proportionally equal terms to its other customers competing with the recipient of the payments at the time of the promotion, regardless of the time-separation between the date upon which the arrangement is made and the date the services are to be performed.

traced, for 2(d) purposes, only as far as the commingled fungible stock, and that stock should be regarded as composed in its entirety of "such" products or commodities. Only in this way can the marketplace realities of cases such as this be taken into account without frustrating the Act's purpose to afford small competitors equality of purchasing opportunity with larger ones.

There is nothing novel in this proposition of law concerning intermingled products of like grade and quality which are treated in the market place as composing a quasi-fungible mass; it has been the rationale underlying many decisions under many statutes. See, *e.g.*, *Currin* v. *Wallace*, 306 U.S. 1, 11 (1939); *United States* v. *Rock Royal Cooperative, Inc.*, 307 U.S. 553, 551-69 (1939); *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F.2d 43, 49-50 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958); In re *Fruitvale Canning Co.*, 52 F.T.C. 1504, 1506-7, 1512 (1956), *pet. to rev. dismissed on stipulation*, Ninth Circuit No. 15,246, January 30, 1957.

2. The undisputed findings support the Commission's inference to the effect that during petitioners' 1957 promotion and sale of Idaho Canning Company's canned corn, both Hudson House and Wadhams & Co. were other customers of Idaho Canning competing with petitioners in the distribution of canned corn of like grade and quality

As in the case of the Tri-Valley transactions, the Commission made findings covering all of the elements or factors of violations of section 2(d) by Idaho Canning Company, with respect to its payments to petitioners and its failure to make such payments available to Hudson House and Wadhams & Co. Petitioners do not take direct issue with any of those findings, saying only (Brief 61) that it has not "been established that any retail customer of the wholesalers [by which they evidently intend Hudson House and Wadhams & Co.] actually stocked, handled or resold the relevant products of Idaho Canning," and erroneously state that "the Commission admits that the proof in this respect is deficient."

Petitioners' statement that the Commission has admitted such a deficiency is plainly untrue. They apparently are referring to their argument that particular cans of commingled stock must be traced all the way from the seller to the retailers, in order to find that the wholesaler customer was distributing the seller's products to those retailers. The Commission rejected that argument and found (R. 94-95) that, as in the case of Tri-Valley peaches, some of Idaho Canning's corn could not have failed to reach retailer customers of Hudson House and Wadhams & Co. competing with petitioners' retail stores. We do not think that petitioners' bare assertion of their erroneous belief that section 2(d) requires stock-tracing from producer to retailer raises any issue as to the substantiality of the evidence to support the Commission's findings (R. 82-83) that during the period of petitioners' 1957 coupon-book sale Idaho Canning sold to Hudson House and Wadhams & Co. canned corn, under private labels, alike in grade and quality to that sold petitioners and featured and sold by them in that sale, and (R. 93-95) that those customers commingled that Idaho Canning corn with cans bought from other suppliers under the same labels, and distributed cans from that commingled stock to their retailer-customers competing with petitioners at the time of that sale. Those findings are not even inferentially or impliedly challenged by petitioners; their sole criticism is of the Commission's inference (R. 94-95), based on those findings, that some cans of Idaho Canning's corn inevitably reached those retail stores. As we have shown above (pp. 42-45), the undisputed facts amply support that inference, but in any event there is no dispute that those retailers were competing in the distribution of products drawn from the commingled fungible stock, and that is sufficient for section 2(d) purposes.

3. Substantial evidence supports the Commission's findings to the effect that during petitioners' 1957 and 1958 coupon-book sale and promotion of Burlington Industries' hosiery, Lipman, Wolfe & Co. was another customer of Burlington Industries competing with petitioners in the distribution of hosiery of like grade and quality, and that Burlington did not make available to it during those times any allowances or discounts

We find in petitioners' brief arguments that the evidence fails to establish that the hosiery Burlington Industries sold to them and to Lipman, Wolfe & Co., the Portland retail department store, was of like grade and quality (Brief 46-48), or that Lipman, Wolfe's purchases during the sales were contemporaneous with petitioners' advance purchases in anticipation of the sale (Brief 48-50), or that proportionally equal discounts or allowances were not available to Lipman, Wolfe (Brief 50-52). All three contentions are fallacious.

First, as to simultaneity. Petitioners acknowledge that their purchases from Burlington, although contracted for in orders dated in May of 1957 and June of 1958, were for delivery in August-October of those years, and that Lipman, Wolfe purchased Burlington hosiery during the periods July-October 1957 and August-October 1958 (Brief 46-47). Their argument is solely that simultaneity of sales arrangements and contracts is required by section 2(d). This, as we have shown above (p. 45, n. 17) is erroneous; the simultaneity contemplated by the statute is that of distribution rather than purchase, and that simultaneity petitioners do not deny.

Second, as to likeness of grade and quality. Here also petitioners' own account of the evidence, although incomplete, is sufficient to show that the finding is properly supported. They acknowledge (Brief 47) that Burlington's invoices show that during their 1957 sale Lipman, Wolfe purchased 123 dozen pairs of hosiery bearing the same style numbers as hosiery bought by petitioners and promoted and sold during that sale, and that during the 1958 sale it bought 191 dozen bearing the same style numbers as petitioners' purchases. As we have shown above, a seller's use of a particular style number or name to designate a product is sufficient to permit the inference that all items so designated are identical within manufacturing and commercial tolerances. As against this inference, which the Commission drew in making its finding, petitioners raise only the objections that the products shipped to them and to Lipman, Wolfe bore different labels, and that in ordering the hosiery shipped to them for their sales, they had included certain specifications showing what they wanted to buy (Brief 48). Although there are inaccuracies in petitioners' account of that evidence concerning their orders, they are immaterial because that evidence is itself immaterial here. Because a seller such as Burlington places customers' own private labels on merchandise of any grade or quality they may purchase, differences in such labels are no indication of differences in the contents of the package. Likewise, the fact that a customer's purchase order may specify what it wishes to purchase does not indicate that the item which the seller selects from his product lines to fill that order is in any way different, in grade or quality or otherwise, from other items bearing his identical identification designations, which he sells to other customers at or about the same time. Where, as here, the invoices show that the seller identified with identical designations the items shipped to both the favored and unfavored customers, differences in private labels or in purchase order descriptions do not compel the inference that there were differences in the grade or quality of the merchandise.

Third, as to the finding that Burlington did not make any such allowances or payments available to Lipman, Wolfe. Here also even the evidence whose existence petitioners acknowledge, but the content of which they misunderstand, is plainly substantial. The witness Meier, whose testimony they cite but slight, testified that during the relevant period he had been the Lipman, Wolfe hosiery buyer (R. 438), that he was the person who would have transacted cooperative advertising arrangements with Burlington (R. 439), that his store advertised their private brand of Burlington hosiery "between two and six times a year" (R. 444), that he had searched his records for indication of payments of promotional or advertising allowances between August and December 1957 (R. 444), that to the best of his knowledge his company was not paid any cooperative funds by Burlington during September and October of 1957 (R. 444-45), that he had searched his records for indication of cooperative advertising allowances or promotional allowances between August and December of 1958 and to the best of his knowledge his company was not paid any during that period (R. 445), that to the best of his recollection he was not offered, during either period, the payment of any cooperative advertising funds from Burlington (R. 445), and that from his experience it would be unusual for Burlington to offer advertising allowances on private label or unbranded hosiery, because of its lower price (R. 445-46). He also testified that he received no discount from Burlington (R. 458), that he would accept any discount available, in many cases sought discounts, and in all cases negotiated with suppliers to get the best terms possible (R. 461).

That evidence is uncontradicted by anything in the record, and it plainly is substantial support for the finding that Burlington did not make available to Lipman, Wolfe any discount or allowance in connection with the latter's resale of Burlington hosiery at the same time Burlington was participating in petitioners' 1957 and 1958 coupon-book promotions and sales.[18]

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[18] Petitioners' further argument (Brief 51-52) concerning possible different ways in which sellers may proportionalize their allowances to different customers, while replete with errors, has nothing to do with the Burlington transactions, because before any issue of proportional equality of allowances or offers can be reached there must have been such allowances or offers to both customers, and here there were none to Lipman, Wolfe.

Since petitioners do not challenge any other aspect of the Commission's conclusion that Burlington Industries' participation in the 1957 and 1958 coupon-book sales constituted violations of section 2(d) of the Clayton Act, we submit that that conclusion should be upheld.

4. Substantial evidence supports the Commission's findings to the effect that during petitioners' 1956 coupon-book sale and promotion of Cannon Mills towels, Roberts Brothers department store was another customer of Cannon Mills competing with petitioners in the distribution of towels of like grade and quality

Petitioners attack the Commission's conclusion that Cannon Mills violated section 2(d) by its participation in the 1956 coupon-book sale, by contending (Brief 53-55) that the evidence does not sufficiently establish that the Cannon Mills towels they promoted and sold were of like grade and quality to those purchased from Cannon Mills by Roberts Brothers, the competing Portland department store, or that that store had such towels on hand during the period of that sale.

As to like grade and quality, their argument is the same here as before, and the answer is the same. They acknowledge (Brief 53) that Cannon Mills' invoices to them and to Roberts Brothers used identical style numbers to designate and identify the towels each purchased. As against this wholly adequate basis for the inference of identity of the products so designated, they argue only that certain other evidence does not corroborate it (Brief 54). The fallacy, of course, is that it needs no corroboration. Since there is nothing in the record which, in the face of the invoice evidence, would compel a contrary inference on this point, that evidence is substantial and the finding conclusive.

Petitioners' argument on the simultaneity requirements of section 2(d) with respect to the Cannon Mills transactions is the reverse of those they made when arguing about the Tri-Valley, Idaho Canning, and Burlington Industries allowances. There they argued that simultaneity of purchases by the favored and unfavored customers is the criterion; here, where they must admit such simultaneity, they recognize that simultaneity of the customers' resale efforts is the criterion, and that the dates of purchase are evidence pertinent thereto (R. 54-55). In this, of course, they are at last correct although inconsistent, but they are, as usual, in error in their contention that the evidence does not support the Commission's finding on this point.

They acknowledge (Brief 54-55) that they made purchases in March and October of 1956, and that Roberts Brothers made purchases in April, June, and November of that year. They fail to recognize that, just as their purchases were made for later sale, so, inevitably, were Roberts Brothers'. Indeed, since Roberts Brothers, as a department store, was continuously stocking and selling towels, its purchases in April, June, and November clearly were for maintenance of its stock level. Nothing in this record would compel the unlikely inference that its stock of the towels purchased in June was completely gone in August and September, during petitioners' coupon-book promotion and sale, and that it nevertheless neglected to reorder until November.

Since petitioners do not challenge any other of the bases of the Commission's conclusion that Cannon Mills violated section 2(d) of the Clayton Act by participating in petitioners' 1956 coupon-book promotion and sale, we submit that that conclusion should be upheld.

5. Substantial evidence supports the Commission's finding to the effect that Phillip Morris did not make available to Oregon Piggly Wiggly Company or to United Grocers, Inc., any payments proportionally equal to those petitioners induced and received from Phillip Morris

As we summarized above in our counterstatement of the case (pp. 9-10), the Commission found that petitioners induced and received from Philip Morris in 1956 and 1957 four lump-sum payments for promoting Phillip Morris products, that Phillip Morris then had a regular cooperative advertising program under which it made payments or allowances to all its customers on proportionally equal terms, that the payments petitioners induced and received were not a part of that program but additional thereto, that they were lump-sum payments not based upon or related to any quantitative factor in the buyer-seller relationship between Phillip Morris and petitioners, and that Phillip Morris did not offer any similar payments to Oregon Piggly Wiggly Company or to United Grocers, Inc.

Although petitioners do not specify any of these findings as error, they argue that the evidence does not show that Phillip Morris did not make the same kind of special payments available to those competitors (Brief 89-90), and (Brief 62-66) that the payments they received were not inherently incapable of being offered to other customers on proportionally equal terms. Each of those contentions is erroneous.

The actual evidence in support of the Commission's finding that Phillip Morris did not make similar payments available to those two competitors is clearly substantial. The Commission found (R. 79), and petitioners do not deny, that allowances granted under Phillip Morris regular promotional program were directly and quantitatively related to the volume of the recipients' purchases. It was found, and petitioners do not deny, that both petitioners and Phillip Morris' other customers received those "regular" promotional allowances, and that petitioners received the allowances involved in this case in addition to the regular allowances (R. 76-77). It was found (R. 75-76), and petitioners do not deny here, that the additional payments petitioners received were (1) $500 for Phillip Morris' participation in petitioners' 1956 "Gift Days" promotion, (2) $150 per month during most of 1956 as consideration for petitioners' promotion of Phillip Morris tobacco products, (3) $800 paid on October 24, 1956, as consideration for their promotion of Parliament cigarettes during September 1956, and (4) $400 paid them (in April 1957) in connection with their promotion of Phillip Morris products during their "Thrift Days" promotion.

The witness Skubic testified that she was petitioners' tobacco-buying supervisor (R. 401), and that allowances based upon the volume of purchases were of the kind offered by the manufacturer (R. 415). She testified that she solicited the $500 cash payment, which was given for promotion of Marlboro and Phillip Morris cigarettes (R. 408-9). She solicited the $150 per month payments (R. 409-10), and she agreed that the substance of that transaction was that they displayed cigarettes in preferred locations and received a certain sum for doing so (R. 411). She could not remember what the $800 was received for (R. 412-13.) She testified (R. 413-14) that the reason she knew that a different allowance, for $3 per case on purchases between specified dates, had been initiated by the manufacturer was "because of the type of —this isn't uncommon." She testified (R. 420) that the payment shown on CX 91A (which is the $400 one in April 1957) was a "Thrift Days promotion" with a newspaper advertising tie-in (one week for L & M cigarettes and one for Chesterfields) and that she went to Phillip Morris and asked it to participate.

The witness Henry Meyer testified that he was General Manager of Oregon Piggly Wiggly (R. 292-93), that its stores competed with petitioners' (R. 295), that although he is a brother of petitioner Fred Meyer he owns no interest in the corporate petitioner (R. 301), that his records showed purchases from Phillip Morris in September 1956 and April 1957 (R. 307), that a search of his records showed no payment received from Phillip Morris in 1956 (R. 307-9), and that the only payment received in 1957 was pursuant to an agreement made on March 25, 1957, whereby the Piggly Wiggly stores gave away a carton of Pepsi-Cola with each carton of Phillip Morris cigarettes and were thereafter reimbursed by Phillip Morris at their cost for the Pepsi-Cola given away (R. 309-10). Testimony given by personnel of United Grocers was to similar effect (see, *e.g.*, R. 602-10, 613-16, 618-19, 621-24).

The witness Eberling testified that he was Phillip Morris' Division Manager supervising the Portland trade area (R. 531-32), that both the corporate petitioner and Piggly Wiggly were direct retailer accounts (R. 532-33). He testified that allowances in which amounts granted are based upon quantities purchased are a "type of arrangement that's made out of the New York office and to all accounts in the United States" (R. 533-35). Regarding the $800 payment in October 1956 to petitioners, he testified that it is not the same type as the prorated allowances (R. 535), and when asked if he could recall making an "offer of the same nature * * * available to competing customers, to all competing customers, on a proportionally equal basis," answered "I can't recall." When asked "do they have to come to you and ask for it," answered, "On a special deal, yes" (R. 535-36). He testified that the $400 payment in April 1957 was of the same type, and when asked "if a competing customer of Fred Meyer wanted that type of an allowance, he would have to come to you and ask for it," he first tried to evade the question by saying "It's available to them," but when counsel insisted "But do you make the offer," answered "No" (R. 536). When further pressed with the question "To your best knowledge and recollection, do you recall making such an offer available to competing customers of Fred Meyer on a proportionally equal basis?" said, "I have no knowledge" (R. 537).

That testimony clearly is substantial evidentiary support for the Commission's findings that those payments were special ones granted in addition to those available to all customers under Phillip Morris' regular program (R. 76-77), that those special deals were not made available to petitioners' competitors (R. 77-79; *cf.* In re *Kay Windsor Frocks, Inc.*, 51 F.T.C. 89, 95 (1954); In re *Chestnut*

Farms Chevy Chase Dairy, 53 F.T.C. 1050, 1060 (1957); *Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission*, 311 F.2d 480, 484-85 (2d Cir. 1962)), and that even if similar deals had been offered, the offers could not have been upon terms proportionally equal to those petitioners received (R. 79-82; *cf. Vanity Fair*, *supra*, 311 F.2d at 486-87).[19]

Since we find in petitioners' brief no other attacks upon the Commission's determination that Phillip Morris violated section 2(d), we submit that determination should be upheld.

C. *The Commission properly ruled that on the facts of this case both Wadhams & Co. and Hudson House, when acting as wholesalers of the products of the discriminating suppliers, were "other customers" of those suppliers "competing in the distribution of such products or commodities," within the meaning and protection of section 2(d) of the amended Clayton Act*

Petitioners contend (Brief 29) that where the recipient of a discriminatory payment or allowance is the owner of retail stores, wholesalers selling to competing retailers cannot, as a matter of law, be considered "other customers competing in the distribution" of the products concerned, within the protection of section 2(d). We submit

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[19] If petitioners' bare assertion that United Grocers is a wholesaler (Brief 62) raises any issue here (which we doubt, in view of their failure to specify as error the Commission's contrary determination or the findings on which it was based, or to argue that the determination is error or that the evidence does not support those findings), we submit that the Commission's determination that it is a retailer, on the facts of this case, is properly supported by its undisputed findings and the undisputed principles of law which it applied thereto (R. 85, n. 34).

In any event, as we show in the next section of this brief, section 2(d) would protect United Grocers and its members even if it were to be classified as a wholesaler.

that petitioners are in error, and that the Commission, in reasoning particularly commended to the Court's attention (R. 85-93), has properly interpreted the section to be applicable to actual competitors without limitation by differences in functional levels at which they operate. The Commission's construction is in accordance with the language of the statute, is necessary to effectuate the Congressional purpose in enacting it, and is supported by the decision in *Krug* v. *International Telephone & Telegraph Corp.*, 142 F. Supp. 230, 236 (D.N.J. 1956), and the rationale of former Commissioner Kern, dissenting in part, in In re *Liggett & Myers Tobacco Company, Inc.*, 56 F.T.C. 221, 253-57 (1959).[20]

While the Commission's construction of section 2(d) is at odds with this Court's ruling in *Tri-Valley Packing Association* v. *Federal Trade Commission*, 329 F.2d 694, 707-9 (9th Cir. 1964), we submit that ruling should be reconsidered.[21] The briefs and arguments submitted to the

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[20] See also *State Wholesale Grocers* v. *Great A & P Tea Co.*, 258 F.2d 831, 837-39 (7th Cir. 1958), *cert. denied sub nom., General Foods Corp.* v. *State Wholesale Grocers,* 358 U.S. 947 (1959). Compare *Elizabeth Arden, Inc.* v. *Federal Trade Commission,* 156 F.2d 132, 135 (2d Cir. 1946), *cert. denied,* 331 U.S. 806 (1947).

[21] That ruling, of course, is now the law of the *Tri-Valley* case, in which, pursuant to the Court's remand to the Commission, further administrative proceedings are now being conducted. As this Court has directed in that case (329 F.2d at 710), "[a]ny judicial review following the entry of Commission orders resulting from proceedings on remand may be upon the present record and briefs as appropriately supplemented." We see nothing in the *Tri-Valley* decision that would prevent this Court, upon possible judicial review following the conclusion of the remand proceeding, from exercising its discretion to reconsider its prior ruling respecting the Commission's construction of section 2(d). Whether or not this will be necessary or desirable in the event of further judicial review may be contingent, in part, upon whatever disposition of the present administrative proceeding in *Tri-Valley* is made by the Commission.

Court in *Tri-Valley* indicate that the issue was not fully discussed or squarely presented. It is of great importance to enforcement of the Clayton Act, and has not heretofore been directly considered or ruled upon by any other court of appeals or by the Supreme Court.[22] For these reasons we respectfully request the Court to consider the matter anew.

In order to restrict the coverage of section 2(d) in the manner petitioners wish, it would have to be construed as if it contained, in place of "competing in the distribution," a narrowly restricted phrase such as "competing at the same functional level, as at wholesale or retail, in the direct resale to customers in the same functional class." With due deference, we must submit that such a construction would amount to amendment rather than interpretation and application. The construction, we submit, would be contrary to the plain language of the amended Clayton Act, which nowhere bases any distinction upon, or even mentions, any of the many functional classes into which some writers classify merchants for other purposes. It is highly significant that the statute, as the Commission noted (R. 89), speaks of competition in the "distribution" of products, not merely in their "resale."

The inequitable result that necessarily would follow from petitioners' narrow construction, as the Commission has more fully noted (R. 87-88), was neither intended nor effected when Congress in 1936 enacted the Robinson-Patman amendments to the Clayton Act. As originally enacted in 1914, the Clayton Act was focused on certain predatory practices of large sellers, but after its

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[22] Petitioners' "see also" reference (Brief 31) to decision in *Alhambra Motor Parts* v. *Federal Trade Commission,* 309 F.2d 213 (9th Cir. 1962), incorrectly implies that something in that decision is apposite on this point. That case involved section 2(f) which, as noted, prohibits buyers from inducing and receiving price discriminations prohibited by section 2(a).

passage there grew up large retail chains which exercised great power as buyers. As stated in *Federal Trade Commission* v. *Simplicity Pattern Company*, 360 U.S. 55, 69 (1959):

> A lengthy investigation conducted in the 1930's by the Federal Trade Commission disclosed that several large chain buyers were effectively avoiding § 2 by taking advantage of gaps in its coverage. * * * "Advertising allowances" were paid by the sellers to the large buyers in return for certain promotional services undertaken by the latter. Some sellers furnished special services or facilities to the chain buyers. Lacking the purchasing power to demand comparable advantages, the small independent stores were at a hopeless competitive disadvantage.
>
> The Robinson-Patman amendments were enacted to eliminate these inequities. * * *

And see *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, 174 (1960); *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 543-44 (1960); *Grand Union Co.* v. *Federal Trade Commission*, 300 F.2d 92, 96 (2d Cir. 1962).

The Commission was plainly correct in finding that if the narrow construction were adopted "the entire structure of 'independent' food merchants—including the traditional wholesaler and his numerous, small retailer-customers—[would be] placed completely outside the pale of Section 2(d) of the amended Clayton Act insofar as their competition with the direct-buying 'chains' is concerned" (R.86-87). Furthermore, as the Commission pointed out (R. 87):

> The startling nature of this conclusion is even more evident, however, when it is considered that those who *would* be entitled to claim the protection of Section 2(d) in this situation are the other "chains" located in the area. Thus in a geographical market served by, say, two direct-buying "chains," and one wholesaler with 100 retailer-customers, a supplier who gave a promotional allowance to Chain

> A would not be required by Section 2(d) to give it to either the wholesaler or the 100 independent retailers who buy from it, but would have to give it to Chain B. This would mean, of course, that the protection of Section 2(d) is accorded to those who presumably have the market power to take care of themselves (competing "chains"), but denied to those who, as the instant record clearly shows, need its protection very badly indeed.

It would conflict with economic reality to apply the prohibitions of section 2(d) only within descriptive functional classes such as wholesalers and retailers even in instances where, as this record shows, they actively compete with each other in the distribution of the same products. The realities of the present-day marketplace are such that functional labels such as "wholesalers," "retailers," "jobbers," "factors," and "brokers" are often not only ambiguous but meaningless and irrelevant to determination of the fact of competition in the distribution of the same products. The Supreme Court has approved the Commission's disregard of such labels in determining in Clayton Act cases whether different customers are actually competitors, *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 475 (1952), because in any reasonable implementation of antitrust objectives, "the crucial fact is the impact of the particular practice on competition, not the label that it carries," *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 397 (1953). See also *United States* v. *Masonite Corp.*, 316 U.S. 265, 280 (1942); and *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 615 (1953).[23]

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[23] In noting the problems created by dual systems of distribution in connection with the enforcement of the Clayton Act, as amended by the Robinson-Patman Act, a leading antitrust commentator has recently observed (Kintner, Book Review, 64 Col. L.R. 1166, 1170 (1964):

> Many fundamental policy considerations are ignored if too great emphasis is placed on technical labeling of

The harm to competition in the distribution of products, which the Congress sought to prevent by section 2(d), is the same when wholesalers whose retailer-customers compete with direct-buying retail chains do not receive a fair share of the promotional allowances received by the latter, as it is when the discrimination is between wholesalers reselling to retailers, or between retailers. Petitioners here perform the same distribution function for their retail stores as do the wholesalers for their retailer-customers, and compete for the same consumer dollars as do the wholesalers and the retailers, as the Commission found (R. 88-90). They are, therefore, truly "competing" with both wholesalers and retailers "in the distribution of" those products, within the plain meaning of those words in section 2(d).

As the Commission found (R. 89):

> Every time an independent retailer loses a sale to [petitioners], the wholesaler who supplied that independent retailer suffers a loss of volume by just that much. And if all of the independent retailers in Portland should close their doors, these wholesalers would be finished in that market.

The ability of the more than 100 Portland independent retailer-customers of those two wholesalers to compete on an equal basis with petitioners depends on whether or not they are able to obtain through their wholesalers the

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functions within a distributive system. I feel strongly that the Commission and the courts should carefully evaluate any situation in terms of achieving a rational enforcement policy consistent with the realities of the market place.

My hope that this goal may yet be achieved was strengthened by the Commission's recent decision in the *Fred Meyer* case [footnote omitted]. * * * By focusing on the realities of the market place rather than on technical location within the ladder of distribution, the Commission promoted the statutory policy to protect independent retailers by finding the wholesaler and his customers to be in competition with direct buying chains.

benefits of proportional shares of the promotional allowances given by the suppliers.[24] As the Commission properly found (R. 89-90):

> Any competitive disadvantage experienced by the wholesaler himself in buying goods in competition with the chains is necessarily passed on to its retailer-customers. If it pays more for a given product than [petitioners] pay, the price it charges the independent retailers will naturally reflect that higher price. (One of these wholesalers, Wadhams & Co., actually sells on a "cost-plus" basis, i.e., it charges its retailer-customers the price it pays for the goods, plus a fixed percentage of that amount to cover its other costs and its profit margin.) And if the wholesaler is denied promotional allowances received by [petitioners], it obviously cannot pass them on to its retailer-customers or use them for the benefit of those customers.

Limiting the applicability of section 2(d) to customers competing at the same functional level of distribution would render that provision inconsistent with other portions of the same statute. Congress intended by the interrelationship of sections 2(a), 2(d), and 2(e) to prevent circumvention of the prohibitions of section 2(a) by use of alternatives for price discriminations. It logically follows that in any circumstance in which a price discrimination would violate section 2(a), a discriminatory allow-

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[24] While one writer would impose functional tests in determining the fact of competition (Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962) at pp. 396-97), use of such criteria has been properly criticized as "too narrow." Baum, *The Robinson-Patman Act* (1964) at pp. 54-55:

> Rather, the central question should be whether competition is affected by the grant of an allowance or service to one purchaser and not another. The functional criterion in this context loses its relevancy. (See *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 47 (1948); and *Fred Meyer, Inc.*, Dkt. 7492 (March 29, 1963)).

See also *Kintner, supra,* 64 Col. L.R. at 1170.

ance would violate section 2(d) and a discriminatory service would violate section 2(e).

Petitioners' attempt (Brief 31-32) to derive comfort from the omission from section 2(d) of the "effects" language found in 2(a) is specious, as the extensive discussion of the matter in the Commission's opinion (R. 90-93) makes clear.

The effects language of section 2(a) specifies in detail the several levels of "competition" where competitive *injury* must be found, *regardless of the level or levels in which the discrimination occurs*, which can be elsewhere, and between customers at different "functional" levels. *E.g., Standard Oil Co.* v. *Federal Trade Commission*, 173 F.2d 210, 212, 217 (7th Cir. 1949), *rev'd on other grounds*, 340 U.S. 231 (1951); *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 40-41, 55 (1948); *Forster Mfg. Co.* v. *Federal Trade Commission*, 335 F.2d 47, 53 (1st Cir. 1964), *cert. denied*, March 2, 1965, 33 LW 3285; In re *Fruitvale Canning Co.*, 52 F.T.C. 1504, 1508-12, 1514 (1956), *pet. to rev. dismissed*, January 30, 1957, Ninth Cir. No. 15246. And see Austin, *Price Discrimination and Related Problems Under the Robinson-Patman Act* 51-54 (2d Ed. 1959).

The decision in *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505 (1963), affords additional support to the Commission's refusal to give identical meaning to the terms "competition" and "competing" at every place they appear in different contexts in the several subsections of section 2. The Commission correctly observed (R. 90) that "while 'competition' in one form or another is the concern of the several subsections of the Act, there is no universal definition of that term that can be applied mechanically to all of its provisions." Citing *Sun Oil*, the Commission further noted, as an example, that " 'competition,' as used in Section 2(b)'s 'meeting competition' proviso, refers *solely* to competition with the discriminating *seller*, i.e., to 'primary-line' competition," and properly concluded that, because "[n]one of the other subsections are so limited," "the scope of 'competition' embraced by one of the Act's provisions is not necessarily controlling in the context of another section" (R. 90).

Petitions' reliance (Brief 33, 34) on the *Sun Oil* decision thus is clearly misplaced. That case involved the scope of the good faith meeting of competition defense, in the context of a case involving price discrimination under section 2(a), not one involving disproportionate promotional allowances under the *per se* provisions of section 2(d.) It is clear that the Supreme Court in *Sun Oil* did not intend its language respecting the scope of the section 2(b) defense in a section 2(a) case to determine the entire coverage of section 2(d).

Contrary to petitioners' assertions, it *was* squarely held in *Krug* v. *International Telephone & Telegraph Corp., supra*, 142 F. Supp. at 236, that a "violation of Section 2(d) may occur when a manufacturer gives a retailer an allowance not given to a wholesaler whose customers compete with such retailer." We are unable to read the *Krug* decision as solely involving, in the words of petitioners (Brief 35), "a special application of the familiar 'indirect customer' doctrine." And we are unaware that any court or antitrust commentator has interpreted *Krug* in any other manner than as viewed by the Commission herein.[25]

We submit that the Court should reconsider this issue, and, contrary to the views it expressed in *Tri-Valley*, hold that upon proper facts, including those of this case, a wholesaler may be a "customer competing" with a retail chain "in the distribution of" a discriminating supplier's

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[25] See, *e.g.*, Austin, *Price Discrimination and Related Problems Under the Robinson-Patman Act* 134-35, 137-40 (2d Ed. 1959); Rowe, *Price Discrimination Under the Robinson-Patman Act*, 397, 398-99 (1962). Compare Kintner, Book Review, 64 Col. L.R. 1166, 1170 (1964). And see 52 Geo. L.R. 195, 197 (1964).

products, within the meaning and protection of section 2(d).[26]

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[26] Petitioners also argue (Brief 36-37) that because the Commission's complaint did not allege the same legal theory upon which the Commission decided the point discussed above, there has been a fatal variance between complaint and decision. They do not, and of course cannot, assert any variance between proof and decision.

The argument is frivolous. As the Commission pointed out (R. 148-57), they had ample opportunity to develop all the relevant facts, the only issue was the proper application of the law to those facts, and petitioners had full opportunity to argue that issue. Even under the old common-law rules of pleading, only facts, and not legal theories, were required to be pleaded. Under modern notice pleading in both courts and agencies even variances between the facts alleged in pleadings and those found in decisions are not automatically fatal. As was held in *Armand Company* v. *Federal Trade Commission*, 84 F.2d 973, 974-75 (2d Cir. 1936):

> [T]he respondent [alleging variance] must maintain that the order so far abandoned the very frame and outline of the original charge that it had no greater sanction than if the bailiff had signed it. * * * At least in a contested case there must be an entire abandonment of the very substance of the dispute to which the defendant was summoned, and the substitution of another which he could not have anticipated, and which he had no opportunity to meet.

The court concluded (84 F.2d at 975) that to hold otherwise "would be to go back at least two centuries."

Accord, *Carter Products, Inc.* v. *Federal Trade Commission*, 323 F.2d 523, 533 (5th Cir. 1963); *NLRB* v. *Mackay Co.*, 304 U.S. 333, 349-50 (1938); *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F.2d 52, 54 (4th Cir. 1950). *Cf. Tri-Valley Packing Ass'n* v. *Federal Trade Commission*, 329 F.2d 694, 697-700 (9th Cir. 1964); and Rule 15(b), Rules of Civil Procedure for United States District Courts.

D. ***The Commission's finding to the effect that petitioners were aware of the facts making illegal the discriminatory payments and allowances they induced and received from their suppliers is properly supported by the undisputed findings as to underlying facts, and by the findings petitioners challenge here, which are supported by substantial evidence***

Petitioners cite, but misunderstand, one of the court decisions closest in point on the issue of a buyer's knowledge of facts making illegal under section 2(d) discriminatory payments it induces and receives from a seller. That decision is *Giant Food Inc.* v. *Federal Trade Commission*, 307 F.2d 184 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963). It is not correct, as petitioners declare (Brief 80), that in *Giant* the court held that "a finding of unlawful inducement can only be made '. . . in circumstances where it appears that such want of knowledge on the buyer's part was culpable,'" or that "in order to find that [the buyer] acted culpably, it must be shown that good faith was lacking." Neither *Giant* nor any other decision of which we are aware has mentioned a lack of good faith as an element of proof in any case of this kind, and the court in *Giant*, instead of holding that culpable want of knowledge is the only proper basis for a finding of unlawful inducement, actually held the obverse: that the Supreme Court's *Automatic Canteen* decision (on which petitioners in *Giant* and here rely) "cannot be read to mean that a buyer can plead want of knowledge as a successful defense * * * in circumstances where it appears that such want of knowledge on the buyer's part was culpable" (307 F.2d at 184). This statement of what is not a valid defense cannot, we submit, be twisted into petitioners' distorted assertion as to what constitutes the only basis for a valid "finding of unlawful inducement." [27]

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[27] We treat petitioners' distortion of the *Giant* ruling in more detail than it individually might deserve, because it is one of the clearer examples of the manner in which they have

What the court actually held in *Giant* was plainly quite different from petitioners' version. Following the sentence we have quoted above it said (*loc. cit.*): "[T]he question becomes whether or not, upon the record as a whole, the Commission introduced enough evidence to show that Giant, at the time it induced and received the payments from its suppliers, possessed information sufficient to put upon it the duty of making inquiry to ascertain whether the suppliers were making such payments available on proportionally equal terms to Giant's competitors."

Petitioners, although citing *Grand Union Co.* v. *Federal Trade Commission*, 300 F.2d 92 (2d Cir. 1962), elsewhere on other points, fail to mention the pertinent ruling therein (at p. 100): "The record supports [the Commission's] finding that Grand Union knew, or in the exercise of reasonable care should have known, that the payments received had not been made proportionally available to its competitors." Also, although citing *American News Co.* v. *Federal Trade Commission*, 300 F.2d 104 (2d Cir. 1962), *cert. denied*, 371 U.S. 824, they fail to mention what was said there (at p. 110): "Although knowledge must be proved, it need not be by direct evidence; circumstantial evidence, permitting the inference that petitioners knew, or in the exercise of normal care would have known, of the disproportionality of the payments is sufficient."

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throughout their brief similarly twisted and distorted almost every part of the record and every court and Commission decision, when to do so has suited their arguments. Because of those consistent and all-pervading distortions, we have found it impossible within time and page limitations to answer all of them, relevant and irrelevant, and therefore have mentioned only the more important and representative. We request the Court, therefore, not to construe our silence as to anything said on any subject anywhere in petitioners' brief as acquiescence in petitioners' version of fact or law.

Relying upon those precedents affirming its prior decisions, the Commission in this case found (R. 117) that petitioners "possessed more than enough 'information to put upon [them] the duty of making inquiry' as to whether or not their participating suppliers were taking steps to make those promotional payments available to other buyers." The Commission based that finding upon additional findings (which petitioners neither specify as error nor argue are not supported by substantial evidence) that (1) "it was [petitioners], not the suppliers, who originated or initiated the programs under which the concessions were granted," (2) "when they conceived these plans and presented them to their suppliers, [petitioners] thereby began to receive payments other buyers necessarily could not have been enjoying at that moment," and (3) in order to make the same concessions available to all other buyers, the suppliers in question would have therefore had to initiate, subsequent to [petitioners'] solicitation, a program based on, or including as one of its alternative features, the arrangement with [petitioners]" (R. 117-18).

The Commission then made the ruling which petitioners erroneously attack (Brief 81) as unprecedented and wrong: "We think the law is plain that a buyer who initiates a promotional service and induces his supplier to pay him for performing it has possessed himself of 'information sufficient to put upon it the duty of making inquiry to ascertain whether the suppliers were making such payments available on proportionally equal terms to [his] competitors'" (R. 118). The Commission then, drawing upon its expertise in this field, made the following findings concerning the realities of the marketplace context in which such solicitations and payments occur: (1) "the natural reaction of a supplier who has yielded to the demands of one of his larger customers is not to further lighten his purse by making the same payments to hundreds of others, but to minimize his outlay by concealing the fact that he has made any such payment at all," (2) "a powerful buyer does not go to a seller with hat in hand asking to be given something that is 'proportionally equal' to what the smaller buyers are getting; he wants something *in addition* to what the others are receiving," and (3) "the result is almost invariably a situation in which the initiating buyer continues to receive the same promotional allowances all other buyers are receiving, plus the new one he has conceived himself" (R. 118). Petitioners do not specify any of those findings as error, or argue that they are not properly based upon the Commission's expertise in this field. They are self-evidently correct, as this Court properly may assure itself from facts concerning human nature and commercial practices within the scope of its own judicial knowledge.

We submit that the Commission's ruling is correct, and should be affirmed. Petitioners are in error in asserting (Brief 81-82) that it is unprecedented, that it conflicts with the Supreme Court decision in *Automatic Canteen Co.* v. *Federal Trade Commission* 346 U.S. 61 (1953), and that it improperly requires the buyer to assume that its suppliers are guilty of illegal behavior.

First, the ruling is not unprecedented, but follows logically from the *Grand Union*, *American News*, and *Giant Food* decisions. More importantly, in *R. H. Macy & Co.* v. *Federal Trade Commission*, 326 F.2d 445, 450 (2d Cir. 1964), where the evidence showed that Macy's had induced and received discriminatory special-occasion payments from its suppliers, the court held that "once the Commission proved that special payments had been made only to Macy's, the burden of coming forward with evidence that similar payments were available to Macy's competitors * * * was on Macy's." [28] That ruling goes further than but includes the Commission's in this case; the burden of proving availability cannot be carried without first ascertaining availability.

Second, the Commission's ruling does not conflict with

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[28] Macy's was represented by the firm of Howery, Simon, Baker & Murchison, petitioners' principal counsel in this case. The *Macy* decision is highly relevent upon this and other points petitioners argue, yet they have not even mentioned it.

Automatic Canteen. That decision was concerned with proof of the buyer's knowledge under section 2(f) of the *absence* of elements of the sellers' affirmative *defenses* to charges of violations of section 2(a), rather than his actual or imputed knowledge of the *presence* of elements of the sellers' offenses under either that section or 2(d), and no rulings were made therein on the latter problem. Furthermore, as the court held in *American News, supra,* 300 F.2d at 111, "there is nothing in the Supreme Court's opinion in *Automatic Canteen* * * * which precludes the imposition of a duty of reasonable inquiry upon a buyer."

Third, the Commission's ruling does not conflict with the rule applicable in determining rights between parties to civil suits, one of which has relied to his injury upon an assumption as to the honesty and legality of the actions of the other, as in *Fidelity & Deposit Co.* v. *Grand National Bank of St. Louis,* 69 F.2d 177, 183 (8th Cir. 1934), which petitioners cite (Brief 82). The Commission's ruling plainly does not require buyers to assume any illegality; it merely requires them, when they have in their possession facts indicating possible illegality, not to ignore them. That requirement is not novel; it has long been the law that "everyone is presumed to know everything he can learn upon inquiry, when he has facts in his possession which suggest inquiry," and that he "must be charged with knowledge of that which it was his duty to know." *United States* v. *Pearson,* 62 F. Supp. 767, 769 (N.D. Cal. 1945). *Accord, Metropolitan Bag & Paper Dist. Ass'n, Inc.* v. *Federal Trade Commission,* 240 F.2d 341, 344 (2d Cir. 1957), *cert. denied,* 355 U.S. 819; *Phelps Dodge Refining Corp.* v. *Federal Trade Commission,* 139 F.2d 393, 396 (2d Cir. 1943). "A man is presumed to know what a reasonable person ought to know from facts brought to his attention," and cannot "close his eyes to the obvious." *Avery* v. *Commissioner of Internal Revenue,* 22 F.2d 6, 7 (5th Cir. 1927).

In this case there can be no doubt that either petitioners received information that their contributing suppliers were selling the same products to petitioners' competitors and not making similar payments to them, or would have received such information had they inquired. The undisputed findings quoted above would therefore be entirely sufficient, standing alone, to support the Commission's finding that petitioners were aware they were inducing and receiving discriminatory payments.

But that evidence does not stand alone. The Commission found (R. 119), and petitioners do not dispute here, that the coupon-book participation contracts contained the provision: "Offer Must Be Exclusive at Fred Meyer During the 4 Week Period." The Commission found (R. 120) that this mean that "each supplier who participated in [petitioners] 'coupon book' promotion agreed with [petitioners] that it would not, during that particular four-week period of time, 'participate' in a similar program sponsored by any other buyer." Petitioners do not dispute that finding here, but argue (Brief 83) that there is no evidence that the contractual requirement was carried out. But the provision itself is such evidence, and it is unrefuted by anything in the record. It shows petitioners' purpose to obtain the discriminatory payments it did in fact receive. Petitioners cannot be heard now to deny that they were aware that they were receiving the very discriminatory preferences which they demanded. "It may fairly be assumed that one who has reason to believe a fact exists, knows it exists." *Shaw* v. *Railroad Co.*, 101 U.S. 557, 566 (1879).

As against all of this petitioners offer (Brief 86-90) only a few selected scraps of testimony, such as that of their buyer who purchased from Tri-Valley and Idaho Canning (R. 86) to the effect that he did not question Tri-Valley about other customers or prices, and that he did not know what other customers those two sellers had in the Portland area. That is irrelevant, as we have shown above. But in addition, it tells us nothing about awareness of other persons in the management of the corporate petitioner, or of the individual petitioners. Most importantly of all, however, the argument consists only of an attempt to persuade this Court that those scraps are credible, are probative, and outweigh and refute all of the rest of the evidence concerning petitioners' knowledge, which the Commission relied upon in making its findings (R. 103-30).[29] Petitioners do not and cannot deny that that evidence logically permits the inferences which the Commission drew from it. They do not and cannot contend that their scraps of testimony so completely refute that evidence as to compel the drawing of contrary inferences. They candidly admit (Brief 8) that their argument is that the Commission made the findings they attack by "misconstruing the evidence." In effect, therefore, they have admitted the legal substantiality of the evidence supporting the findings, but want this Court to decide that it was less authoritative and less persuasive than their scraps. Such matters are not properly argued to a court of appeals in an appellate review proceeding of this kind. *Stauffer Laboratories, Inc.* v. *Federal Trade Commission*, Ninth Circuit No. 19,279, February 17, 1965 (slip op. p. 7). This Court's decision in *Esco Corporation* v. *United States*, No. 19,348, January 20, 1965 (slip op. p. 11), is pertinent. As in that case, even if the evidence did not compel the inferences drawn by the Commission (which they plainly did), it cannot be said that, as a matter of law, contrary inferences are compelled. As a result, to paraphrase what this Court said there, "it remains a question for the trier of fact to consider and determine what inference appeals to it [the Commission] as most logical and persuasive, after it has [considered] all the evidence" relevant to the factual issue, and petitioners' argument "is more appropriately made to [the Commission] than to an appellate court."

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[29] The evidence cited and principally relied upon by the Commission in making those findings appears in the record at pages 191-95, 200, 207-9, 212-21, 226-30, 238-39, 473, 478-96, 498-505, 551, 556.

We submit that petitioners have failed completely to demonstrate any error in the Commission's findings of fact or rulings of law concerning their knowing inducement and receipt of illegal payments and allowances, and that its decision as to that matter therefore should be affirmed.

III. The Commission correctly determined that petitioners have violated section 2(f) of the amended Clayton Act by knowingly inducing and receiving price discriminations prohibited by section 2(a) of that Act

A. *Because of a subsequent Commission decision in a related case involving,* inter alia, *the same price discriminations by Cannon Mills Company involved in this case, we do not rely upon those price discriminations in this review*

The Commission concluded that petitioners have violated section 2(f) of the amended Clayton Act by soliciting and receiving from their suppliers price discriminations in their annual four-week coupon-book promotions and sales. The four suppliers whose transactions in the 1956, 1957, and 1958 sales were studied as representative were Tri-Valley, Idaho Canning, Burlington Industries, and Cannon Mills. As to each of these the Commission found the presence of all elements of violations of section 2(a) by the seller, the absence of all of the affirmative defenses available to the seller, and petitioners' awareness thereof.

The Commission's final action in this case was taken on July 9, 1963. At that time there was pending before the Commission a proceeding in which Cannon Mills was charged with having violated section 2(a) by, *inter* *alia*, granting to petitioners the same price discriminations involved in this case (In re *Cannon Mills Company*, Docket 7494). On April 24, 1964, after the petition for review in this case had been filed in this Court, and after the Commission had lost jurisdiction in this case by certifying its record to this Court, the Commission rendered its final decision in the *Cannon Mills* case. In that decision it found that "the evidence of record is insufficient to prove the requisite adverse effects on competition," and dismissed the proceeding.[30]

Although we believe that it is a valid principle of law that each case should stand upon its own record, and that the record in this case contains evidence sufficiently substantial to support the Commission's finding as to competitive injury resulting from the Cannon Mills discriminations, we believe that in equity petitioners should have the benefit in this case of the Commission's determination, in *Cannon Mills*, that the similar evidence in that record did not constitute the preponderance, even though issues as to the greater weight of evidence are not open for redetermination in appellate review proceedings such as this.

Accordingly, while we rely upon Cannon Mills' discriminations as constituting violations of section 2(d), as we have argued above, we do not rely upon its price discriminations as constituting violations of section 2(a), or upon their inducement and receipt by petitioners as constituting violations of section 2(f).

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[30] The case was before the Commission for its *de novo* review of the record and the examiner's initial decision. The examiner had held that a *prima facie* case had been proved, including the requisite probability of anticompetitive effects, but had upheld Cannon Mills' affirmation defense of cost-justification. The Commission vacated the decision because of the lack of a *prima facie* case, and therefore did not "reach the merits of respondent's cost-justification defense." 3 CCH Trade Reg. Rep. ¶ 16,878. For convenient reference a copy of the Commission's final order is printed in appendix "C" of this brief, pp. 6b-7b.

B. ***The Commission correctly determined that petitioners' suppliers have violated section 2(a) of the Clayton Act by discriminating in price between petioners and their competitors, and that petitioners were aware of the facts making those discriminations illegal***

A breakdown of the provisions of section 2(a) of the Clayton Act shows that to support a ruling that a supplier has violated that section it must be properly found that—

(1) the supplier is engaged in commerce, and in the course thereof

(2) discriminated in price

(3) between different purchasers

(4) of commodities of like grade and quality

(5) where the effect may be

(a) substantially to lessen competition or tend to create a monopoly in any line of commerce

(b) or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

A breakdown of section 2(f) shows that in cases brought against a buyer all of those factors must be properly found, plus the facts that—

(6) the buyer induced or received the discriminations

(7) knowing the facts which made them illegal.

In addition, in cases brought under section 2(a) discriminating sellers are allowed to prove certain affirmative defenses. The Supreme Court, in *Automatic Canteen, supra*, 346 U.S. at 74, held that "a buyer is not liable under § 2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or not known by him to be within one of those defenses." The Court further held that in proceedings under section 2(f) proof of the absence of cost justification and of the buyer's awareness thereof is a part of the affirmative case, rather than of the buyer's defense.

The Commission made findings as to all of those elements of proof with respect to the participations by Tri-Valley, Idaho Canning, and Burlington Industries in petitioners' 1957 and 1958 coupon-book promotions and sales.

Petitioners' specify as error (Brief 7, sp. 1) the Commission's finding and ruling that the price cuts and rebates they received from those suppliers constituted price discriminations within the coverage of section 2(a), and argue (Brief 16-26) that they were discriminations in payments for services within the exclusive coverage of section 2(d).

They do not specify with particularity any of the other findings as error. They argue, however (Brief 78-79), that solely because their coupon-book sales occurred but once each year the finding of probable competitive injury is erroneous. They also argue (Brief 46-48, 56-58) that the evidence does not support the findings that the products Tri-Valley and Burlington Industries sold to them and their competitors were of like grade and quality, nor (Brief 85-89) the finding that they were so aware. They assert that the evidence does not prove that the discriminations of Burlington Industries (Brief 52) or Idaho Canning (Brief 61) were not cost justified or that they were so aware, and also (Brief 70-78) that the evidence does not prove that they were aware that any of the sellers' discriminations were not cost justified. Each of those arguments is fallaceous, as we shall show below.

1. The Commission properly determined that the price cuts and rebates petitioners induced and received from Tri-Valley, Idaho Canning, and Burlington Industries were "discriminations in price" within the meaning and coverage of section 2(a)

Petitioners, disregarding the undisputed findings and the evidence, and completely misunderstanding the authorities, argue (Brief 16-26) that the price cuts and rebates they received from their suppliers cannot be considered price discriminations, as found by the Commission (R. 69-74), but must be considered to be *only* discriminations in payments for services and *solely* within the coverage of section 2(d).

In the first place, the coverages of sections 2(a) and 2(d) are not mutually exclusive, so that even if it were possible to agree that the discriminations were for services rendered by petitioners to the suppliers (which plainly they were not), that would not alone preclude their also constituting price discriminations illegal under 2(a) as well. "The discriminatory payments for and furnishing of merchandising services prohibited by Sections 2(d) and 2(e) may or may not amount to indirect price discriminations within the meaning of Section 2(a). When they do, they are within the reach of both sections." Austin, *Price Discrimination and Related Problems Under the Robinson-Patman Act* 126 (2d Ed. 1959). *Cf. Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. 2d 988, 990, 993 (8th Cir. 1945), *cert. denied*, 326 U.S. 773; *Sun Cosmetic Shoppe* v. *Elizabeth Arden Sales Corp.*, 82 F. Supp. 687, 688 (S.D.N.Y. 1949), *rev'd on other grounds*, 178 F.2d 150 (2d Cir. 1949). We are not aware of any decisional or other authority to the contrary, and that includes all the decisions upon which petitioners rely. Such overlapping coverage is consistent with the Congressional purpose. See, *e.g.*, H. R. Rep. 2287, 74th Cong., 2d Sess 15-16 (1936); 80 Cong. Rec. 9418 (1936).[31]

This overlap of the coverage of the two sections makes futile petitioners' attempt to support an accusation "that

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[31] Petitioners seem to be suggesting (Brief 17-18) that post-sale rebates, such as those by which Tri-Valley and Idaho Canning accomplished their discriminations, cannot be considered as elements of price. But the outlawing of precisely such discriminatory rebates was one of the purposes of the Clayton Act and of the Robinson-Patman amendments. See, *e.g.*, 80 Cong. Rec. 8104, 8111, 8112, 8113, 8121, 8126, 8127, 8132 (1936), where every speaker condemned them—even those who otherwise opposed the amendments. *Cf. American Can Co.* v. *Ladoga Canning Co.*, 44 F.2d 763, 767-70 (7th Cir. 1930), *cert. denied*, 282 U.S. 899.

the Commission has arbitrarily catagorized certain portions of the challenged transactions solely for the purpose of supporting an order against petitioners" (Brief 24), by making erroneous accusations to the effect that in separate proceedings against the same suppliers it has determined that the very same discriminations were "within the purview *only* of section 2(d)" (Brief 24-25); that in the case of Tri-Valley it "specifically found" that they "constituted promotional payments within the meaning of section 2(d)" and defended that finding in this Court, which upheld it (Brief 25). Although the overlap would make those statements irrelevant even if true, we must point out that they are incorrect.

Petitioners cite as one such case (R. 24) that against Cannon Mills, Docket 7494. But in that case the same price cuts as those involved in this case were attacked as price discriminations, as the Commission's final order dismissing the action makes clear, and as petitioners elsewhere in their brief (pp. 26, 79) reveal that they are well aware.

They also cite In re *Idaho Canning*, Docket 7459. That decision is reported at 58 F.T.C. 657 (1961), and in it, as in this case, the $350 was alleged as a 2(d) violation and the rest as a 2(a) violation, and the order, issued on consent without findings of violations, was similarly drafted.

The *Burlington Industries* proceeding, Docket 7493, which petitioners cite (Brief 24) was brought only against promotional-payment discriminations, and also was settled on consent, without decision by the Commission of the issues as to the violation. 56 F.T.C. 1105 (1960).

Petitioners cite only one of the two *Tri-Valley* proceedings before the Commission, Docket 7476. The other was Docket 7225. They were consolidated for hearing and decision by the Commission, and are reported together at 60 F.T.C. 1134 (1962). The Docket 7225 proceeding involved price discriminations under section 2(a), and the other involved discriminatory allowances under section 2(d). Although Paragraph 5 of the complaint in the latter case alleged both the $350 and the remainder to support the charge of 2(d) violation (60 F.T.C. at 1137-38), the decision was otherwise. In his consolidated initial decision in both proceedings (60 F.T.C. at 1138-68) the examiner found *only* the $350 payment constituted a 2(d) violation (finding 34; F.T.C. at 1146-47). When before the Commission for its *de novo* review Tri-Valley contended that the examiner's finding (as to the $350) was error (60 F.T.C. at 1173-74), arguing that it was a price rather than a service-payment discrimination. It was that argument which the Commission rejected, and which this Court, on review, rejected also, 329 F.2d at 708. There was no finding about, and there was no argument about, the rest of the Tri-Valley discriminations involved in this case, then or thereafter, before the Commission or in this Court.

Petitioners' accusations of unfairness by the Commission thus are plainly unwarranted. We submit that upon the obvious facts concerning the circumstances of those three suppliers' transactions, the Commission was correct in holding them to be price discriminations.[32]

2. The Commission's finding to the effect that the price discriminations petitioners induced and received might adversely affect competition is not rendered invalid by the circumstance that petitioners' coupon-book sales occur only once each year

The only attack petitioners make upon the Commission's determination as to the probability of adverse competitive effect resulting from the price discriminations they induced and received from Tri-Valley, Idaho

[32] Petitioners' contentions appearing at pages 20-23 of their brief are all irrelevant here, since they ignore the findings completely, as well as the evidence upon which they were based, and consist only of an attempt to persuade this Court that selected items of evidence support the inferences petitioners wish the Court to substitute for the Commission's findings.

Canning, and Burlington Industries, consists of the accusation that the Commission has "ignored entirely" the fact that they were "once-a-year" occurrences (Brief 78), and the unargued assertion (Brief 78-79) that because of that fact, the adverse effect "must necessarily have been temporary and minimal, and insufficient to support a finding of violation of 2(a)," citing *American Oil Co.* v. *Federal Trade Commission*, 325 F.2d 101, 106 (7th Cir. 1963), *cert. denied*, 377 U.S. 954.

In the first place, the Commission did not "ignore entirely" the fact that petitioners' coupon-book promotion sales occur every year. It explicitly noted that fact, and then found (R. 123-24): "we must assume that [petitioners] have not acted arbitrarily or capriciously in selecting, for the past 25 years or more, a four-week period that begins in September and ends in October." "The inference is plain that [petitioners] themselves regard this as the most propitious season of the year for staging this particular type of promotion. Accordingly, we must conclude that a competitor, even if permitted to use the coupon book program in, say, July, would not get the same results per dollar of expenditure that [petitioners] get in September and October."

The Commission did not follow those findings with a discussion of the precise issue petitioners now try to raise, but only because petitioners did not raise it before the Commission.[33] The *American Oil* decision, *supra*, upon which petitioners place their entire reliance, involved a factual situation quite different from petitioners' annual sales. In that case the discriminations occurred in a retail gasoline price war which was not started by American and which lasted less than three weeks. The core of the

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[33] *Cf. United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36-37 (1952); *DeGorter* v. *Federal Trade Commission*, 244 F.2d 270, 272 (9th Cir. 1957); *Barclay Home Products* v. *Federal Trade Commission*, 241 F.2d 451, 452 (D.C. Cir. 1957), *cert. denied*, 354 U.S. 942 (1957); *Halstead* v. *Securities & Exchange Comm'n*, 182 F.2d 660, 669 (D.C. Cir. 1950).

decision was that, the court felt, the price war was over before any real injury had occurred, since it was over no further injury was probable, and because of low prices by other major-brand stations the injury would have occurred even if American had not discriminated (325 F.2d at 104-106). None of those factors is present in this case, and the court in *American Oil* explicitly distinguished the two types of situations, 325 F.2d at 106.

3. Substantial evidence supports the Commission's findings to the effect that the price discriminations petitioners induced and received from Tri-Valley, Idaho Canning, and Burlington Industries did not "make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered," within the meaning of section 2(a) of the Clayton Act, and that petitioners were so aware

In *Automatic Canteen, supra*, 346 U.S. at 79-81, the Supreme Court held that in a case against a buyer under section 2(f) it is the Commission's burden to produce evidence tending to show that discriminations he induced or received were not cost-justified, and that he was so aware. It then discussed types of evidence which would suffice to support findings as to both those facts. We believe that what it said is so significant here as to warrant direct quotation (with emphasis and footnote comments supplied):

> If the requirement of knowledge in § 2 has significant function, it is to indicate that the buyer whom Congress in the main sought to reach was the one who, knowing full well that there was *little likelihood* of a defense for the seller, nevertheless proceeded to *exert pressure* for lower prices.[34] Enforce-

[34] Petitioners correctly acknowledge (Brief 69) that "proof that a buyer coerced its suppliers to grant price concessions

ment of the provisions of § 2(f) against such a buyer should not be too difficult. Proof of a cost justification being what it is, too often no one can ascertain whether a price is cost-justified. But *trade experience in a particular situation can afford a sufficient degree of knowledge* to provide a basis for prosecution.[35] By way of example, a buyer who knows that

may well estop the buyer from claiming that it lacked knowledge or reason to believe that the concessions received were unlawful." "Such inducement of concessions would obviously have occurred under circumstances which rendered the buyer's claimed lack of knowledge culpable." But they are in error in asserting (*loc. cit.*) that no such circumstances are involved in this case. The Commission made findings showing that petitioners coerced Idaho Canning into granting its 1957 price discriminations. It found (R. 132) that while petitioners' 1957 sales were over $40 million, Idaho Canning's were only slightly over $1 million. It found (R. 113-14) that petitioners approached that supplier about the matter early in 1957, that Idaho did not agree to grant the discriminations and did or said nothing to lead petitioners to believe that it had agreed, but petitioners nevertheless featured an Idaho Canning product in their 1957 sale and thereafter billed it $350 for the coupon-book page and $2,953.41 for the 1/3 cut in price. It found that Idaho denied the debt and returned the bill to petitioners, and thereafter petitioners deducted the total from a payment to Idaho, that Idaho protested and petitioners returned the money to Idaho, but a few months later Idaho yielded and shipped to petitioners $2,935.41 worth of free goods. The Commission also found (R. 115-16) that petitioners were "less than candid" about this at the hearing.

Those findings clearly show coercive pressures by petitioners upon that supplier, and petitioners neither specify them as error nor argue that they lack substantial evidentiary support. They are, under the familiar principles of law which petitioners acknowledge (Brief 69) sufficient to charge petitioners with full knowledge of the illegality of the discriminations they coerced from Idaho, and to warrant the inference that other suppliers' grants were not entirely voluntary.

[35] Trade experience more informative than petitioners' can scarcely be imagined. The Commission found that the corpo-

he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer can fairly be charged with notice that a substantial price differential cannot be justified. The Commission need only show, to establish its prima facie case, that the buyer knew that the methods by which he was served and quantities in which he purchased were the same as in the case of his competitor. If the methods or quantities differ, the Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, knowing these were the only differences, *should have* known that they could not give rise to sufficient cost savings. The showing of knowledge, of course, will depend to some extent on the size of the discrepancy between cost differential and price differential, so that the two questions are not isolated.[36] A showing that the cost differences are very small compared with the price differential should be sufficient.

What other circumstances can be shown to indicate knowledge on the buyer's part that the prices

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rate petitioner owns and operates 13 supermarkets in the area, that its 1957 sales exceeded $40 million, that it sells one-fourth of all food sold at retail in that area and is the second largest seller of all goods therein, that it sells to 75% of Oregon's population and has one supermarket in every neighborhood (R. 60). It found that the coupon-book promotion and sale has been used since about 1936 (R. 62). It found that the individual petitioners are Chairman and President of the corporation (R. 61), that they knew about and authorized the practices, and that the individual petitioner Meyer had been in the industry 50 years (R. 137). Petitioners have neither specified any of those findings as error nor argued that they are not supported by substantial evidence.

[36] It was because of this fact that the same factors which indicate the lack of cost-justification also indicate the buyer's knowledge thereof, that the Commission considered both issues simultaneously (R. 130-36).

> cannot be justified we need not now attempt to illustrate, but surely it will not be an undue administrative burden to explain why other proof may be sufficient to justify shifting the burden of introducing evidence that the buyer is or is not an *unsuspecting recipient* of prohibited discriminations.[37]

Petitioners' argument concerning cost-justification suffers from several defects. First, they erroneously state (Brief 68-69) that the types of factors which the Supreme Court listed as sufficient "defined" the "burden of proof," overlooking the fact that the Court gave them only "by way of example," and clearly indicated that there were "other circumstances" which would also be sufficient. Second, they again ignore the findings and the evidence supporting them, and argue the meaning, credibility, and weight of parts of the evidentiary record, in support of proferred inferences contrary to the findings.[38] Third, they completely fail to mention the finding to the effect that even if there had been cost savings to the sellers in the coupon-book transactions, they would have been the *result* of the special-occasion discriminations, not their *cause*, and fail to mention the Commission ruling to the effect that such *resulting* savings cannot be used to justify their *generating* discriminations (R. 132-33).

The Commission found (R. 131) that "none of the suppliers in question grant quantity discounts." "All buyers, regardless of the quantity in which they purchase from

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[37] Nothing in this record of petitioners' active and persistent demands for and receipt of large and exclusive special-occasion discriminations could possible warrant, let alone compel, the inference that they were mere *"receipients"* of the discriminations, nor that they were *"unsuspecting"* of their illegality; the evidence overwhelmingly shows the opposite.

[38] *E.g.*, petitioners' brief, p. 76, n.47, where petitioners' argument in support of an asserted fact concludes: "An inference to this effect is as well founded as the Commission's inference to the contrary."

the four sellers in question, pay the same invoice price (except for the concessions found unlawful here)." It also found that petitioners' memorandum of their coupon-book agreements contains entries of the regular prices of the suppliers' products and their special prices for the coupon-book sales. Petitioners do not specify those findings as error or argue that they are not supported by the evidence.

Based largely upon those facts, the Commission found (R. 131-32) that petitioners "pay, during eleven months out of the year, the same price that every other buyer pays," and "after the one-month period of the coupon book promotion ends, they go back to paying that higher price." Petitioners do not specify that inferred finding as error, nor argue that the undisputed findings do not make it permissible. Their only attack upon it consists of the irrelevant and incorrect assertion that there is no direct evidence on the point (Brief 76, n. 47).[39] The fact of the matter is that petitioners' broker gave such evidence (R. 123-24), as did the non-favored buyers (R. 271-73, 445-56).

From these facts the Commission drew an inference that petitioners' purchasing in larger quantities than their competitors does not generate "any measurable cost savings for those sellers." Petitioners do not specify that finding as error, and do not argue that it is not supported by substantial evidence. Their only attack upon it consists of a speculation that "it is entirely possible that there were in fact cost savings which would have entitled

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[39] Petitioners irrelevantly declare (Brief 75) that there is no evidence which indicates that their purchases during the rest of the year involved quantities as large as those purchased for the sale. But petitioners had in their possession full evidence on that point, if it existed, so its absence from the record does not refute the inference, but strengthens it instead. *Mammoth Oil* v. *United States,* 275 U.S. 13, 52 (1927). *Cf. Vanity Fair Paper Mills* v. *Federal Trade Commission,* 311 F.2d 480, 485-86 (2d Cir. 1962).

Fred Meyer to lower prices during" the rest of the year, and the claim that "an inference to this effect is as well founded as the Commission's inference to the contrary." The request for a substitution of one "well founded" inference for another is plainly misaddressed to an appellate court.

Having thus found that there were no justifying cost savings generated by differences in the *quantities* in which the products were sold or delivered to petitioners for their coupon-book sale, the Commission turned to the matter of possible differences in costs resulting from differing *methods* by which the commodities may have been sold or delivered to them.

It found (R. 133), based upon testimony by petitioners' officials, that "every feature of their purchasing from the suppliers in question remained precisely the same during the various one-month periods of the coupon-book promotions as during the remaining eleven months of the year (methods and terms of shipment remained the same, purchasing through the broker continued, and so forth)." [40]

In attempted refutation of those findings petitioners rely upon the fact (Brief 71) that in one order in September 1957 they purchased 3,967 cases of corn from Idaho Canning for the 1957 sale, and that Hudson House purchased only 2,200 cases in six transactions during August-October 1957, while Wadhams & Co. purchased only 80 cases in three orders during August and September, and erroneously state (Brief 72) that *Automatic Canteen* held that "no inference of guilty knowledge is permissible unless the evidence shows that the allegedly favored and disfavored customers purchased in substan-

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[40] The Commission cited testimony by Vanover, petitioners' head grocery buyer supervisor at the relevant time (R. 192), familiar with the transactions (R. 192-93). He testified to the effect that there was no change whatsoever in the methods by which the products of Tri-Valley and Idaho Canning were sold or delivered to petitioners (R. 220-22).

tially the same quantities." *Automatic Canteen* plainly did not so hold, and the witness Moss (general manager of Idaho Canning; R. 473-74) gave testimony showing that from that seller's viewpoint petitioners and Hudson House purchased substantially the same quantities of its products (R. 497).

Those facts clearly warrant the inference that the price discriminations, amounting in the case of Tri-Valley and Idaho Canning to 33⅓%, were not cost justified. Those who, as petitioners did, coercively obtain from a reluctant seller such as Idaho Canning, such a large concession, with complete and reckless indifference to the question of whether it could be cost justified, cannot now be heard to claim ignorance of the truth they could have discovered from information so readily available to them.

In addition to relying upon the affirmative evidence which shows petitioner's actual awareness, we submit that where, as here, price discriminations are not merely offered by the seller and accepted by the buyer, but actively sought by a buyer who has and knows that he has a strong bargaining position, he has the duty under the law to inquire of his seller whether the discriminations he is demanding are cost-justified by the methods or quantities in which the seller serves him, and the burden, in any section 2(f) proceeding, of producing evidence that he did so inquire, and what answer he received, if any. Nothing in *Automatic Canteen* precludes application of such a rule; indeed the Court in that case said (346 U.S. at 78) that "ordinary rules of evidence were to apply," and it indicated that its list of means of proving a buyer's knowledge was not intended to be exclusive, saying (at 79-80) "what other circumstances can be shown to indicate knowledge on the buyer's part that the prices cannot be justified we need not now attempt to illustrate." And as the court held in *American News*, *supra*, 300 F.2d at 111, "there is nothing in [*Automatic Canteen*] which precludes the imposition of a duty of reasonable inquiry upon a buyer." "Indeed, that opinion stated that the Commission might find knowledge under

§ 2(f) that payments induced and received were not cost-justified (the issue there) if it showed two things: first, that the buyer knew of a price differential, and, second, that one familiar with the trade should know that such a differential could not be cost-justified."

Furthermore, as the Commission found (R. 119-20), petitioners' contract with those suppliers provided that the arrangement under which those suppliers' products were sold at greatly reduced prices to petitioners for resale during the coupon-book sale, would be exclusive during the 4-week period. Thus even if petitioners' sales had increased so much during that period that their increased purchases had produced cost savings to the suppliers, the contract prevented the sellers from entering into similar arrangements with petitioners' competitors which might have enabled them to increase their sales and cost-justify the same price-cuts by the suppliers. As a result, it cannot be said that the discriminations from which petitioners benefited were caused by differentials in costs resulting from the quantities in which they purchased, because what in fact happened is just the reverse. The claimed differentials in sales and in costs, if they existed, would have resulted from the price discriminations which petitioners demanded and received.

Buyers cannot, we submit, demand and obtain large price discriminations, use them to increase the volume of their sales and purchases, then claim that the increase resulted in cost savings justifying the discriminations. That would not only be to put the cart before the horse, but would defeat enforcement of sections 2(a) and 2(f) entirely, by allowing special-event price discriminations to justify themselves. This, as the Commission held (R. 132-33), is not allowed by the cost-justification proviso in section 2(a).

Furthermore, the fact that those discriminations were the result of special concessions to one purchaser, rather than of a program by which the sellers varied their prices to all customers in accordance with quantities purchased and cost-savings thereon, is an additional reason why they are outside the protection of the cost-justification proviso. Where, as here, the opportunity to obtain the lower price by purchasing in larger quantities at one time is granted to one buyer by contracts which expressly give him the "exclusive" privilege of doing so, the cost-justification proviso is inapplicable. *Alhambra Motor Parts* v. *Federal Trade Commission*, 309 F. 2d 213, 216 (9th Cir. 1962). This distinction is necessary to prevent evasion, for otherwise, as here, discriminations could be cost-justified simply by not letting the unfavored competitors konw of the availability of quantity discounts, or by otherwise making unavailable to them price cuts based on such cost savings, as, *e.g.*, in *American Can Co.* v. *Ladoga Canning Co.*, 44 F.2d 767-70 (7th Cir. 1930), *cert. denied*, 282 U.S. 899. *Cf. Mueller Co.* v. *Federal Trade Commission*, 323 F.2d 44, 46 (7th Cir. 1963), *cert. denied*, 377 U.S. 923.

Finally, the record leaves no doubt that when petitioners demanded and received the discriminations, they did not claim them as something to which they were entitled by reason of cost savings resulting from larger purchases, but demanded them solely to underwrite their special sales. It also leaves no doubt that when the suppliers acceded to those demands, they did not do so because of any belief they were justified by cost savings, but solely to placate a powerful buyer. That which was, when granted, a discrimination not even attempted to be based upon cost savings, cannot subsequently be "artifically tailored" into one "by fitting it to some imaginary basis or standard that has never in fact existed." *Cf. Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F.2d 988, 994 (8th Cir. 1945), *cert. denied*, 326 U.S. 773.

For the foregoing reasons we submit that the record fully supports the Commission's determinations to the effect that the price discriminations petitioners actively induced and received from Tri-Valley, Idaho Canning, and Burlington Industries on its purchases of their products for its coupon-book sales were not "differentials which [made] only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities [were] to [petitioners] sold or delivered," within the meaning of that exemption in the Clayton Act, and that petitioners knew or should have known that fact.

IV. The Commission's inclusion of the individual petitioners, by name, in its order to cease and desist, and its inclusion in the prohibition against inducing and receiving discriminatory payments of a phrase making explicit its valid application to discriminations between petitioners and wholesalers competing with them, was not an abuse of discretion

Most of petitioners' attack upon the Commission's order is misdirected, since it consists merely of criticisms of specific phrases used by the hearing examiner in his proposed order (Rr. 53-54), which the Commission did not include in the order it drafted and issued (Apdx B). For those reasons we believe it is unnecessary to respond in detail to the erroneous assertions as to the nature of rulings in various court decisions, with which petitioners have attempted to support their moot criticisms.[41]

The only arguments which are not misdirected are those criticizing the order's specific reference to the individual petitioners (Brief 95-96) and to competing wholesalers (Brief 102). The latter contention, however, is not really a criticism of the order as such, but of the Commission's ruling as to the law's application, which petitioners recognize by their failure to urge that the provision should be deleted even if the Court agrees with the Commission's ruling.

Petitioners' contention that the order should not apply to the individual petitioners is plainly without merit. As

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[41] This Court's decision in *Western Fruit Growers Sales Co.* v. *Federal Trade Commission,* 322 F.2d 67, 69 (1963), *cert. denied,* 376 U.S. 907, which petitioners did not cite, contains the answers to their erroneous contentions.

this Court recognized in *Western Fruit, supra*, 322 F.2d at 69, it is proper for the Commission to make its orders binding on all unnamed officers of a corporation, so the difference for which they argue is its application to them as individuals.

They do not specify as error or argue as unsupported by evidence the Commission findings (R. 136-39) that they are and have been the controlling owners of the corporation and the officers directly responsible for the practices found illegal, and that "the corporate [petitioner] is nothing but the 'alter ego' of those two individual [petitioners]." Instead they offer, as usual, assertions to the contrary (R. 95), citing their denials of power and responsibility, which the Commission did not believe and which are plainly incredible.

The decisions they cite do not support their contentions, when the real facts are taken into consideration, and they do not even attempt to support with citation of supposed authority their erroneous statement that "absent a showing of special circumstances indicating a likelihood that corporate petitioner may seek to evade the order issued, it was error for the Commission to include these individuals, as individuals, in the order" (Brief 95). The truth is that, as the Supreme Court held on similar circumstances in *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 120 (1937), it would be error to delete them. The test is whether the Commission could reasonably have thought the prohibition is necessary. *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431 (1957). Clearly the Commission could have, and did, think so in this case.

CONCLUSION

For the foregoing reasons the Commission's order should be affirmed and enforced.[42]

Respectfully submitted.

JAMES McI. HENDERSON
General Counsel

J. B. TRULY
Assistant General Counsel

E. K. ELKINS
HAROLD D. RHYNEDANCE, JR.
Attorneys

Attorneys for the Federal Trade Commission

Washington, D. C.

March 1965

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

E. K. Elkins

E. K. ELKINS
Attorney for the Federal Trade Commission

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[42] "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Federal Trade Commission Act, section 5(c), 52 Stat. 112, 15 U.S.C. 45(c). Section 11(c) of the Clayton Act, 73 Stat. 243, 15 U.S.C. 21(c), contains a similar provision.

APPENDICES

APPENDIX A

Federal Trade Commission Act, section 5(a)(1), 66 Stat 632; 15 U.S.C. 45 (a)(1):

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

Clayton Act, as amended, section 2, 49 Stat. 1526, 15 U.S.C. 13:

> (a) * * * it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacturering, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchases sold or delivered * * *.
>
> (d) * * * it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.
>
> (f) * * * it shall be unlawful for any person engaged in commerce, in the course of such commerce,

knowingly to induce or receive a discrimination in price which is prohibited by this section.

Robinson-Patman Act, section 3, 49 Stat. 1528; 15 U.S.C. 13a:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality and quantity * * *.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

Docket No. 7492

In the Matter of

FRED MEYER, INC., a corporation, and
FRED G. MEYER and
EARLE A. CHILES, individually and as officers of said corporation.

FINAL ORDER

Pursuant to the Commission's order of March 29, 1963, respondents having filed objections to the proposed order to cease and desist in this proceeding, a proposed alternative order, and reasons in support thereof; and counsel in support of the complaint having filed a reply thereto; and

The Commission, for the reasons stated in the accompanying opinion, having rejected respondents' objections and having further determined that its proposed order to cease and desist should be issued as the final order of the Commission:

IT IS ORDERED that respondent Fred Meyer, Inc., a corporation, and its officers, and Fred G. Meyer and Earle A. Chiles, individually and as officers of corporate respondent, and respondents' agents, representatives and employees in connection with the offering to purchase or purchase in commerce, as "commerce" is defined in the amended Clayton Act, of products for resale in outlets operated by respondents, do forthwith cease and desist from:

> Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price respondents know or should know is below the net price at which said products of like grade and quality are being sold by such seller to other customers where respondents are competing with the purchaser paying the higher price or with a customer of the purchaser paying the higher price.

For the purpose of determining the "net price" under the terms of this order, there shall be taken into account all discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

IT IS FURTHER ORDERED that respondent Fred Meyer, Inc., a corporation, and its officers, and Fred G. Meyer and Earle A. Chiles, individually and as officers of corporate respondent, and respondents' agents, representatives and employees, directly or through any corporate or other device in or in connection with any purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of products for resale in outlets operated by respondents, do forthwith cease and desist from:

> Inducing and receiving anything of any value from any supplier as compensation or in consideration for services or facilities furnished by or through respondents in connection with the processing, handling, sale or offering for sale of products purchased from such supplier, when respondents know or should know that such compensation or consideration is not being affirmatively offered or otherwise made available by such supplier on proportionally equal terms to all of

its other customers competing with respondents in the sale and distribution of such supplier's products, including other customers who resell to purchasers who compete with respondents in the resale of such supplier's products.

IT IS FURTHER ORDERED that respondent Fred Meyer, Inc., a corporation, and its officers, and Fred G. Meyer and Earle A. Chiles, individually and as officers of corporate respondent, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist set forth herein.

By the Commission, Commissioner Elman dissenting and Commissioner Higginbotham not participating.

/s/ Joseph W. Shea
JOSEPH W. SHEA,
Secretary.

ISSUED: July 9, 1963

purchase in commerce, as "commerce" is defined in the amended Clayton Act, of products for resale in outlets operated by respondents, do forthwith cease and desist from:

> Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price respondents know or should know is below the net price at which said products of like grade and quality are being sold by such seller to other customers where respondents are competing with the purchaser paying the higher price or with a customer of the purchaser paying the higher price.

For the purpose of determining the "net price" under the terms of this order, there shall be taken into account all discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

IT IS FURTHER ORDERED that respondent Fred Meyer, Inc., a corporation, and its officers, and Fred G. Meyer and Earle A. Chiles, individually and as officers of corporate respondent, and respondents' agents, representatives and employees, directly or through any corporate or other device in or in connection with any purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of products for resale in outlets operated by respondents, do forthwith cease and desist from:

> Inducing and receiving anything of any value from any supplier as compensation or in consideration for services or facilities furnished by or through respondents in connection with the processing, handling, sale or offering for sale of products purchased from such supplier, when respondents know or should know that such compensation or consideration is not being affirmatively offered or otherwise made available by such supplier on proportionally equal terms to all of

its other customers competing with respondents in the sale and distribution of such supplier's products, including other customers who resell to purchasers who compete with respondents in the resale of such supplier's products.

IT IS FURTHER ORDERED that respondent Fred Meyer, Inc., a corporation, and its officers, and Fred G. Meyer and Earle A. Chiles, individually and as officers of corporate respondent, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist set forth herein.

By the Commission, Commissioner Elman dissenting and Commissioner Higginbotham not participating.

/s/ Joseph W. Shea
JOSEPH W. SHEA,
Secretary.

ISSUED: July 9, 1963

APPENDIX C

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
John R. Reilly

Docket No. 7494

In the Matter of

CANNON MILLS COMPANY,
a corporation.

Order Vacating Initial Decision and
Dismissing Complaint

This case is before the Commission on the appeal of complaint counsel from the initial decision of the hearing examiner, filed December 3, 1963. While finding a *prima facie* violation by respondent of Section 2(a) of the Clayton Act, as amended, the examiner dismissed the complaint on the ground that respondent had succeeded in its cost-justification defense. Upon examination of the record, the Commission has concluded that the evidence of record is insufficient to prove the requisite adverse effects on competition. Since a *prima facie* violation was not proved, it is unnecessary to reach the merits of respondent's cost-justification defense. Accordingly,

IT IS ORDERED that the initial decision of the examiner be, and it hereby is, vacated.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed for failure of proof on the issue of probable injury to competition.

By the Commission.

SEAL

/s/ Joseph W. Shea
JOSEPH W. SHEA
Secretary.

ISSUED: April 24, 1964

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